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# EXTRACTS FROM TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 66

FRANK J. WILLOUGHBY, LOUIS [illegible]CHT, HENRY E. SEVER, ET AL., PLAINTIFFS IN ERROR,

vs.

THE CITY OF CHICAGO.

MINNESOTA STATE LIBRARY

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

RECORD FILED NOVEMBER 15, 1912.

(23,422)

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## OCTOBER TERM, 1913.

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*vs.*

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 28, 1913.

1 * * * * * * *

And afterwards to-wit on the 28th day of April A. D. 1910 a certain Verdict was filed in the office of the Clerk of said Court in words and figures following to-wit:

STATE OF ILLINOIS,
*County of Cook, ss:*

In the Circuit Court of Cook County.

General No. 119889.

CITY OF CHICAGO
vs.
NINA THOMASSON et al.

In the Matter of Opening South Park Avenue from 55th Street to 56th Street.

We the jury, find the issues for the petitioner herein and find that the property assessed in the assessment roll herein, for which objections have been filed, has not been assessed more than it will be benefited by the improvement nor more than its proportionate share of the cost of said improvement.

HARRY H. CROSS, *Foreman.*
FRANK J. BIRREN.
JAMES SANDS.
JAMES J. CEPEK.
MAX RENNER.
EDWARD PORTER.
FREDERICK HANDS.
ALF YOUNGSTENS.
ROY F. PIERCE.
BERT A. HUTCHINSON.
OWEN KLOOSTER.
JNO. MILNE, JR.

And thereupon on the same day to-wit on the 28th day of April A. D. 1910 the following proceedings were had and entered of record in said court to-wit:

2 119889.

CITY OF CHICAGO
vs.
NINA THOMASSON et al.

In the Matter of Opening South Park Avenue from 55th Street to 56th Street.

*Petition.*

This day come again the parties to this suit by their respective attorneys and the jury heretofore impanelled herein for the trial of said cause also come and say:

We the jury find the issues for the petitioner herein and find that the property assessed in the assessment roll herein for which objections have been filed has not been assessed more than it will be benefited by the improvement nor more than its proportionate share of the cost of said improvement.

Which said verdict is signed by each and all of the jurors aforesaid.

Thereupon all the objectors herein enter their motion for a new trial in said cause.

4/28/10.

* * * * * * *

3 And thereupon on the same day to-wit on the 14th day of June A. D. 1910 the following proceedings were had and entered of record in said court to-wit:

119889.

CITY OF CHICAGO
vs.
NINA THOMASSON et al.

In the Matter of the Assessment for Opening South Park Avenue from 55th Street to 56th Street.

*Condemnation.*

This cause coming on to be heard upon the motion of the petitioner the City of Chicago for judgment herein and the petitioner being represented in open court by its attorneys and all the respondents and objectors herein who have appeared in this proceeding by attorneys being duly represented by their respective attorneys and all other defendants respondents and objectors having been three times solemnly called in open court and appearing not and having been heretofore duly defaulted the court finds that it has obtained jurisdiction of the subject matter and of the petitioner by the filing of the new supplemental petition herein; that it has obtained the juris-

diction of all the defendants respondents and objectors herein by due publication of the pendency of this proceeding and mailing and posting of notices of this proceeding and mailing and posting of notices in strict accordance with all of the provisions of the statute in such case made and provided and the Court having obtained jurisdiction over all other persons having or claiming interest in any of said premises, it is ordered by the court that this cause proceed as to the question of benefits and proportionate share of the cost of the improvement herein and a jury come of twelve good and lawful men who are duly elected, tried and sworn to well and truly try the issues joined as to the questions of benefits and proportionate share
4 of the cost of said improvement and a true verdict render on all questions involved according to the evidence.

And after hearing the proofs and allegations submitted by the respective parties herein as aforesaid the jury bring in their verdict and say:

"We the jury find the issues for the petitioner herein and find that the property assessed in the assessment roll herein for which objections have been filed has not been assessed more than it will be benefited by the improvement nor more than its proportionate share of the cost of said improvement, said verdict being signed by the jury.

Thereupon come all the objectors herein by their respective attorneys and move that the verdict of said jury be vacated and set aside and that a new trial be granted as to the lots, pieces and parcels of land represented by them which motion is denied, to which order said objectors by their respective attorneys severally except.

Whereupon said objectors move in arrest of judgment, which motion the court overrules and said objectors except thereupon.

Whereupon the petitioner, the City of Chicago by its said attorneys prays the court for judgment of confirmation of said assessment upon said verdict against the lots, pieces and parcels of land of the objectors herein who have heretofore filed objections to the confirmation of the assessment and whose objections have not been heretofore adjudicated; and the court having heard the arguments of all of their respective attorneys and being advised in the premises

Doth consider order and adjudge that the assessment heretofore returned and filed by the commissioners herein for benefits by reason of the opening of South Park avenue from 55th street to 56th street be and the same is hereby in all respects confirmed as to sublots 1-2-3-4-5-6 and 8 in Edgar M. Snow and Company's subdivision of (except east thirty seven (37) feet) lot fifteen (15) and all of lot sixteen (16) in block two (2) Yerby's Subdivision of North Half (N. ½) of north half (N. ½) Northwest quarter (N. W. ¼)
5 section fifteen (15) township thirty eight (38) north range fourteen (14) east of the third principal meridian described in said commissioners' report for the amounts in said report contained.

To which judgment said objectors jointly and severally except and pray a joint and several appeal to the Supreme Court of Illinois which is granted by the court on said objectors or such of them as elect to do so filing either joint or several bond or bonds for said ap-

peal in the sum of two hundred fifty ($250.00) dollars conditioned for the payment of the costs of such appeal. Such bond or bonds to be filed within thirty days from this date and to be approved by the clerk of this court. Leave is also given said objectors or such of them as may elect to do so to present Bill of Exceptions herein within thirty (30) days of this date.

On motion of objectors the time heretofore fixed for filing of exceptions in the trial of the legal objections herein is extended to the same date as that for filing bill of exceptions upon question of benefits and proportionate share towit July 14.

This matter coming on to be heard on the motion of objectors herein for a new trial and the Court having heard the arguments of counsel and being advised in the premises overrules said motion.

Whereupon said objectors severally except.

Thereupon said objectors move in arrest of judgment, which motion the court overrules and said objectors thereupon except.

* * * * * * *

(Here follows map marked Objectors' Exhibit 2.)

6 HARRY S. MECARTNEY, called as a witness on behalf of Objectors, being first duly sworn, testified as follows:

Direct examination.

By Mr. PRICE:

Q. Your name, please?
A. Harry S. Mecartney.
Q. Where do you live, Mr. Mecartney?
A. I live at Hinsdale, Illinois.
Q. What is your occupation?
A. Practicing law—trying to.
Q. In the City of Chicago?
A. Yes.
Q. How long have you been practicing here in the City of Chicago?
A. Twenty-eight years.
Q. Are you the name Harry S. Mecartney whose name was recited in the judgment of condemnation offered in evidence by the City on yesterday?
A. I am.
Q. Were you, Mr. Mecartney, familiar with the physical condition in the neighborhood of this improvement at the time it was condemned along about the years 1893 and 1894?
A. I was.
Q. Were you interested in the property at that time?
A. I was interested in it.
Q. In what part of it?
A. I was particularly interested as claiming to be the owner of the South one hundred and fifty feet, if I remember right, the description and also representing the North one hundred and twenty feet as had interests therein.
Q. In which lot?
The COURT: Which lot?
A. Original lots fifteen (15) and sixteen (16); that is all property now covered by Snow & Company's subdivision.

7 Q. That is the same property covered by Snow & Company's subdivision and the same property for which objections were filed here?
A. That is right.
Q. Are you the same Mecartney who signed the plat offered in evidence and received in evidence here of Snow & Company's subdivision as the owner of the property described in that subdivision?
A. I am.
Q. Are you interested as owner of this property at the present time, Mr. Mecartney?
A. I am not technically the owner at the present time. I may be interested by reason of having deeded the property many years ago. In that way I am interested; whether I am liable under warranty or not I am not sure, but any how I am interested in the assessment and in the property in that way.

Q. But you are not interested as being liable directly for any of the assessment?

A. No.

Q. If it should be confirmed in this case?

A. I can't answer that better than I have. If I am liable on my warranty deeds, why then I am interested. If I am not, I am not; but I deem myself interested to the extent of contesting this assessment by reason of having sold that property.

Q. Will you state to the jury, Mr. Mecartney, what was the condition of the property included in Snow & Company's subdivision in the years 1893 and 1894?

Mr. MASON: That is objected to. I object to any testimony going back of 1894, when the judgment of condemnation was entered, one in January, 1894, and the other in October, 1894.

The COURT: Will you have to confine your inquiry——

Mr. PRICE: The petition was filed in 1893; the ordinance was passed in 1892 which you offered in evidence.

Mr. MASON: The condemnation judgment was entered in
8 January, 1894, and October, 1894. Then comes the assessment to raise the money to pay those damages. That ought to be the limit beyond which we ought not to go.

The COURT. I think you will have to limit your testimony to the date of the condemnation judgment.

To which ruling of the court, counsel for objectors then and there duly excepted.

Mr. PRICE:

Q. A condemnation judgment was entered here on the 29th of January, 1894 and the other on the 26th of October, 1894. What is the Court's ruling?

The COURT: Take the earlier date, of course.

Mr. PRICE:

Q. Mr. Mecartney, what was the condition of this property at the time of the entry of the judgment of January 29, 1894?

A. At that time, original lots 15 and 16, with the exception of the East thirty-five feet taken for street purposes was—well, at the North of it was Ross Avenue or 55th Place; on the South of it was Fifty-sixth Street. On the West of it was private property and on the East of it lay this thirty-seven feet taken. Did you ask for the improvements on the property, if any?

Q. Yes, in regard to improvements upon the property, upon lots fifteen and sixteen?

A. At that time there was a two story building known as a World's Fair hotel which I built in 1893, was then standing on the premises. It had thirty or forty small rooms. It was two stories, built of frame and plaster and was in a part, somewhere near the middle of the two lots, that is the middle about, viewing it North and South. It faced East, this hotel did.

Q. Where did its front stand, with respect to the thirty-seven feet taken here?

A. Well, it was set back near the middle of the property and not r from the thirty-seven feet, and faced towards South Park.

Q. You mean by South Park, Washington Park?

A. I should say Washington Park now it is called.

Q. These original lots 15 and 16 fronted North and South d ran through from Ross Avenue to Fifty-Sixth Street, Lot 15 ing on South Park Avenue, is that the case?

A. That was right.

Q. And the property taken was all taken off lot 15, was it not?

A. That is right, too.

Q. None of lot 16 being taken?

A. That is right.

Q. And what were the conditions of the streets in front of these ts on Ross Avenue and Fifty-sixth Street at the time the judg- ents were entered?

A. Ross,—the condition with reference to what?

Q. With reference to being open and the improvement upon such reets and the usability for traffic?

A. Fifty-sixth street was opened and was improved just about hat time, or a little before. Fifty-Fifth Place or Ross Avenue on he North, I have really forgotten whether it was improved at that ime, but it was about that time that it was improved,—that is paved.

Q. By improved, you mean paved?

A. Paved, and the various street improvements were put in about hat time, I think they were in. I think they were in—I am rather ure of it.

Q. Were these streets opened full width to the West.

A. There was no street immediately west until you got——

Q. I mean Ross Avenue and Fifty-Sixth Streets, were they opened hrough streets, goin*f* West?

A. Yes, they were.

Q. They both terminated at South Park Avenue going East, did hey not?

A. That is right.

Q. Did they run West to State Street and other through North and South streets?

A. They did and there were other through North and South streets between them, Calumet Avenue, Prairie Avenue nd other streets.

Mr. Mason: Well, I move to strike out the latter part of the nswer as not responsive to the question.

The Court: Well, strike it out. It is not responsive to the ques- ion.

Mr. Price:

Q. What was the condition of South Park Avenue at that time, Mr. Mccartney? at the time of the entry of this judgment in Jan- uary, 1894?

A. South Park Avenue was macadamized sixty-six feet wide South of this property and North of this property and all street improve- ments were placed in it,—had been placed in it. East of this prop-

erty there was a portion of South Park Avenue from Fifty-fifth Street or Boulevard to Fifty-Sixth Street where paving had been stopped and the street remained unpaved for that distance until—oh no, it had been paved too by that time. The street remained unpaved until September 1, 1893. Then they finished the pavement two or three days after the condemnation petition was filed to condemn it.

Q. So, as a matter of fact, when this judgment was entered in 1894, South Park Avenue was open as it is at the present time, was it?

A. That is right.

Q. And was paved and fully improved as it is at the present time, was it?

A. That is right.

Q. Was the City in full possession of it?

A. It was.

Q. What time did they go into possession, if you know?

Mr. MASON: I object to that as immaterial.

The COURT: Objection sustained; he may answer the question.

To which ruling of the court, counsel for Petitioner then and there duly excepted.

A. On September 1, 1893, the City people went down there and finished the pavement and it was finished up within a week or
11 so after that time. That was the last street improvement.

Q. Has it been open and used as a public street since that time?

A. It has.

Q. What is there to the East of South Park Avenue Mr. Mecartney, opposite this property?

A. Washington Park, along from Fifty-First Street to Sixtieth Street.

Q. What was its condition at the time of this condemnation?

A. It was a public park and used as such Right East of the twenty-nine feet which lies East of this property there was a riding ground. There was a little hedge or something that divided the twenty-nine foot street from the riding ground and then there was a riding ground North and South one hundred feet wide or something like that.

Q. Were there any buildings or structures at that time on the East side of South Park Avenue opposite the property objected for.

A. Only the park-house, about three hundred feet in from the road.

Q. About three hundred feet from the road and the space between that and South Park Avenue, was that open and free of buildings?

A. Right. I suppose the park-house was a little farther in than that; may be five hundred or six hundred feet.

Q. And lots fifteen and sixteen, were at that time entirely free of any buildings except this old World's Fair hotel which you speak of?

A. It was not an old one. It was less than a year old.

Q. Had that been constructed after the street had been improved or before?

A. Right before. Two or three months before.

Q. Is that structure still on the property?

A. No, it was removed about a year after that. I took it down, re-built it on some property away South. I made a mistake which I want to correct, if it is proper at this time.

The COURT: Yes.

The WITNESS:

A. There was an old frame building of one or two stories
12 insignificant in size and value which had been on these premises for many years,—I think probably they were still standing on the rear of lot sixteen at this time. I just forget. It is so long ago, when we removed that.

Q. That was on lot sixteen, rather than fifteen, was it, so far as you remember?

A. That is right. I think we moved that to the rear and when it was taken down, I have forgotten the date.

Q. And was it of any value?

A. Oh, just a few hundred dollars

Q. Was it adapted to property of that description as a permanent improvement?

A. Oh, no. It was just a care-taker's shanty that had been there for years.

Q. Was the World's Fair hotel that you speak of adapted to that class of property as a permanent improvement?

A. Why, no, it was too cheap for it at that time. It cost, well——

Q. Was that the reason for its removal and destruction, that it was not adapted to that property?

Mr. MASON: Objected to as immaterial, the reason why he took it down.

The COURT: How is that material?

Mr. PRICE: I think it is part of the physical situation there.

The COURT: Well, the reas- is not material. The fact is all right.

To which ruling of the court, counsel for objectors then and there duly excepted.

Mr. PRICE:

Q. What was the condition—physical condition and situation of South Park Avenue, South of this property as a through, open street, Mr. Mecartney

A. It was an open street all the way South, indefinitely south.

Q. What class of traffic at that time used that street, for what purpose was it used?

13 Mr. MASON: I object to that as not an issue before this jury. That sort of evidence is competent on the issue of public benefits but not before the jury, the kind of traffic, volume of traffic, how much the public used it and so on are all proper as

testimony on the issue of public benefits; has nothing to do with the benefits to the land.

Mr. PRICE: Those questions are quite as important to the question of benefits to determine what the benefits are as they are on the legal objections. We insisted the other day that questions of distribution of assessment and that sort of thing were not pertinent on legal objections and you misled the court at that time on that.

The COURT: Objection overruled; you can ask your question.

To which ruling of the court, counsel for Petitioner then and there duly excepted.

A. Through traffic; it was a through street, North and South through street was used a great deal for through traffic constantly.

Q. Where does it continue to the North, as a general traffic street?

A. Runs away into the City, North of Thirty-ninth street or in that neighborhood.

Q. North of Fifty-Sixth; to the South of Fifty-Sixth, how far does it run as a through traffic street?

A. South indefinitely, away on South of the Park. I don't think Washington Park Club intercepted it. I think it was along the West side of the Washington Park club or club grounds, at that time ran away south, I don't know how far. A number of miles, I think.

Q. Prior to the taking possession of the City and opening this as a street, as you state was done by arrangement with you prior to the filing of the condemnation——

Mr. MASON: He didn't say anything of the kind. Why not play the game on the square?

Mr. PRICE: I withdraw that question. I will ask that question then. I thought I had asked it.

14 Q. Mr. Mecartney, under what circumstances, if you know, did the City get possession,—take possession of this property for improving it as a street?

Mr. MASON: Objected to as immaterial on this hearing.

The COURT: Sustain the objection.

To which ruling of the court, counsel for objectors then and there duly excepted.

Mr. PRICE: If you want to go on the theory that we had a complete, open street before the condemnation, I guess I can go to the jury on that question.

Q. Mr. Mecartney, assuming that South Park Avenue was full width, sixty-six feet and in public use for traffic at the time this condemnation verdict was entered in this case, condemnation judgment; what, if any, in your opinion, benefit accrued to lots in Edgar M. Snow's subdivision by reason of the entry of this judgment?

Mr. MASON: I obcnct. I object to the form of the question, condemnation of the street—being opened sixty-six feet wide. He don't limit the distance, whether it was North of the Boulevard sixty-six feet wide, South of 56th Street sixty-six feet wide or whether the question assumes it was sixty-six feet alongside of the property in question. The form of the question is vague and uncertain.

r. PRICE: All right, my question assumes the street was open
ie evidence shows sixty-six feet wide in front and along lot 15
een that and Washington Park, that part of South park.
r. MASON: That is objected to because the record don't bear out
assumption.
r. PRICE: The evidence of this witness does.
r. MASON: These benefits are to be measured in connection with
judgment of condemnation.
r. PRICE: That is exactly what I am asking.
r. MASON: And that judgment of condemnation gave us the
t to take thirty-seven feet, not sixty-six feet and as your Honor
remember- of reading, it gave us the right to enter upon
and take and damage, upon payment; only thirty-seven feet
involved, not sixty-six and the benefits are measured in rela-
to that judgment as to the rights which would go under that
gment.
he COURT: I think the objectian is well taken, Mr. Price. You
have to change your question.
r. PRICE: I think the court is in error in that respect. The ev-
ce of this witness shows on the evidence thus far at the time
e condemnation judgments were entered South Park Avenue was
through then as it is now, a sixty-six foot street. Counsel ob-
ed to my showing the condition prior thereto, before the city took
ession and now at the time these judgments were entered, what
ny benefits accrued, assuming the conditions were then as they
by the entry of those judgments,—to this property or could ac-
?
he COURT: By reason of taking the thirty-seven feet that was
olved, the East thirty-seven feet of this property that was in-
ed in the original condemnation proceedings, that is the ques-

Ir. PRICE: It appears the street was——
he COURT: I have ruled on it. Save your exception and go
ad.
o which ruling of the court, counsel for objectors then and there
excepted.

Mr. PRICE:

. Mr. Mccartney, were you familiar with the condition of South
k Avenue opposite the property objected for here in Edgar M.
w's subdivision at the time of the filing of the petition for *for*
demnation in this case, September, 1903?

Ir. MASON: I object to that.
he COURT: That is the same proposition.
Ir. MASON: In the first place, the date is wrong on the petition;
the second place, your Honor has already ruled that this tes-
ony must not go back of January, 1894.

The COURT: October.

Mr. MASON: There were two judgments; of condemnation,
one January and one October, 1894.

Mr. PRICE: When these gentlemen opened to the jury yesterday, they insisted that they would show that this was a thirty-nine foot street here, a sand-dump and that sort of thing East of this property. I don't know how they are going to show that if it is not competent to show the condition prior to the opening of that street. Counsel themselves have opened it up. They charge me with unfairness here and then try to go back on their own proposition here.

Mr. MASON: We are objecting to his going back of January, 1894.

Mr. PRICE: You can't get in evidence which you said you would get in unless you go back of that.

Mr. MASON: You will meet the same difficulty you are meeting now.

The COURT: The ruling would be just as pertinent to the city as it is to you as both sides would necessarily be limited to that date.

Mr. PRICE: If counsel wants this to go to this jury on this proposition when this verdict was entered we had a full sixty-six *feet* street, this property had a full sixty-six foot street there, I don't think I have anything to suffer by it, possibly, though I except to the Court's ruling on this question.

To which ruling of the court, counsel for objectors then and there duly excepted.

Mr. PRICE:

Q. Mr. Mecartney, have you examined the assessment roll in this case?

A. I have.

Q. — now on trial?

A. I have.

Q. Have you examined the distribution of the assessment as to the property North and South of the point at which the property is supposed to have been condemned?

Mr. MASON: Objected to as not an issue before this jury.

The COURT: I don't know what you expect to prove about
17 that. I can't see how it is pertinent.

Mr. PRICE: I ask it in connection with the improvement, supposed improvement here.

Mr. MASON: Then I object because the question is not proper on that theory. The question is of necessity one of comparative benefits.

Mr. PRICE: The question I put was his knowledge as to the roll and the property assessed in it.

Mr. MASON: If your Honor please——

The COURT: That inquiry is all right as to his knowledge.

Mr. MASON: Yes, he may ask how much the total benefits as shown by the roll are and what the proportion of the individual assessment is to all the assessment, but he may not ask him under the rulings of your Honor and the Supreme Court, he may not ask him how it is distributed North of Fifty-Sixth and south of Fifty-sixth and so on.

Mr. PRICE: I am not asking what the roll itself shows. I am asking him if he was acquainted with the property assessed in this case and distribution of the assessment.

Mr. Mason: I object to it, the form of the question and the sub-
nce.
The Court: I will limit this inquiry. He may answer the ques-
n but you must limit your inquiry afterwards to what has been
ed upon.
To which ruling of the court, counsel for Petitioner then and there
ly excepted.
Mr. Price: Answer the question. Read the question, please.
(Question read.)
A. I have examined it, yes.
Q. What, in your opinion, Mr. Mecartney, would be a fair and just
oportion of the total amount assessed in this case on private prop-
y to be assessed upon the lots in Edgar M. Snow & Company's
bdivision, for the making of the supposed improvement in this
se, namely, the widening of South Park avenue 37 feet opposite
e block between 55th and 56th streets?
Mr. Mason: I object to the form of the question, partic-
ularly to the word "supposed" referred to as the improve-
ment that is involved in this proceeding.
Mr. Price: As it appears now it is only a supposition.
Mr. Mason: I object to the remarks of counsel.
The Court: Sustained, the remark will be striken out.

Mr. Price:

Q. Assuming, Mr. Mecartney that through the medium of this
nprovement South Park avenue was opened or widened 37 feet
etween 56th and 55th streets, what proportion of the costs of such
idening and of the amount assessed in this proceeding for the pay-
ent of compensation for such widening, would justly and fairly
e assessed upon the lots in Edgar M. Snow & Company's sub-
ivision?
Mr. Mason: I object to the form of the question.
The Court: In his opinion.
Mr. Mason: The objection to the form of the question is because
e refers to the proceeding as a widening, whereas the record shows
t is an opening. Furthermore, his question does not ask him his
pinion either on proportionate share or benefits.
The Court: He added that.
Mr. Mason: He has it in his former question, not in the last one.
The Court: Will you accept the suggestion of "opening" instead
f "widening" and let that be incorporated in your question, and
lso ask it as his opinion?
Mr. Price: I have no objection to that.
Mr. Mason: Counsel is going on the theory that there is no open-
ing there.

Mr. Price:

Q. With that correction I will ask you the question.
A. I have some very definite opinions on the subject but I feel
myself interested in this matter and I may decline to give an es-

timate because I am interested. I think that should be done by entirely disinterested persons.

Mr. MASON: I move to strike that answer out as not responsive.

Mr. PRICE:

Q. Have you an opinion, yes or no?

19 A. I have an opinion, yes.

The COURT: The rest may go out. "I have an opinion" may stand.

Mr. PRICE:

Q. Do you wish to state that opinion, Mr. Mecartney?

Mr. MASON: I object to whether he wishes to state it or not.

Mr. PRICE:

Q. I will ask you, then, will you state your opinion that you have on the subject?

A. I will with the suggestion that I probably am a prejudiced witness—an interested witness at least.

Mr. MASON: I move to strike that out.

The COURT: That may stand, that probably would develop on cross examination anyway.

A. First, the property covered by Edgar M. Snow & Company's subdivision was not in existence by that description at that time and your question will have to have—I understand it relates to parcels of land of different description and as they existed at that time, these parcels are put in No. 1 as the South 150 feet of Lots 15 and 16 with the exception of the East 37 feet, I presume that is what you are asking for as well as an estimate of the proportionate benefit on the north 120 feet—as to those two lots, that is as the property existed then, the proportionate benefit in my judgment that that property, those two parcels—two lots, 15 and 16, ought to stand of the cost of that entire improvement, as related to all of the property in the roll, and that is your question is it? What proportion, assuming that the entire property is benefited in the roll the full amount of the entire cost of the two tracts taken, what in my judgment is a proper proportion and a just proportion to be levied upon these two tracts of land?

Mr. PRICE:

Q. That is what the question calls for.

A. Assuming that the property on the west side is to stand the entire cost, I would say that the property, the balance of lots 15 and 16 and the balance of Lot 13 from which part was taken, that together should stand not to exceed——

20 Mr. MASON: Wait a moment, I object to his dragging in Lot 13 in his answer. I object, further, to his making a speech on the witness stand, or arguing his case from the witness stand.

Mr. PRICE: I conclude the objection is well taken as to bringing in Lot 13, that was not included in the question.

The COURT: Yes, strike out the reference to Lot 13.

Mr. MASON: I object further to his assuming that the property on the west side of the street is to stand the entire cost of the benefit.

Mr. PRICE: Well, your assessment roll shows it, don't it?

Mr. MASON: Well, that is my objection.

The COURT: I think the objection is well taken. It is unnecessary to make a statement in the answer. It may be stricken out.

Mr. PRICE: I cannot limit the witness as to the method in which he may answer my question.

The COURT: Very well, save your exception.

To which ruling of the court counsel for the petitioner then and there duly excepted.

WITNESS: I desire to ask if you desire me to go on, whether you want me to estimate the proportion that these two parcels or each of them is to stand of the total awards on the parts East, $7,476.00 or whether you want me to estimate the amount it ought to stand of the total award, the amount of which I forget; you have to state.

Mr. MASON: The awards haven't anything to do with the proportionate share of cost.

Mr. PRICE:

Q. The assessment roll before me shows the total amount assessed in this improvement is $20,373.88, the question asked is as to what proportion of that $20,373.88 would be a fair and just amount to assess upon the property, the balance of lots 15 and 16, after taking 37 feet for a street?

A. I would say in my judgment I would say somewhere between fourteen and eighteen per cent of the total cost.

21 Mr. PRICE: You may take the witness.

Cross-examination.

By Mr. MASON:

Q. Mr. Mecartney, you have referred to your interest in the outcome of this suit, as being interested, perhaps, under the warranty clause of certain deeds which you executed conveying some of this property—is that the extent of your interest in the outcome of this suit?

A. That is the entire extent of my interest in the outcome of this suit; what that interest is, of course I mean to leave as a question of law.

Q. Are you not interested in the outcome of this suit in some other way?

A. Well, I don't think so, in a special assessment feature of it.

Q. Have you not gone to the Chicago Title and Trust Company—did you not go to the Chicago Title and Trust Company and convince them of the probability of ultimate success in a former special

assessment here in this matter and did you not put up security and give a heavy bond, and did they not thereupon guaranty the titles on the property, and wasn't all the property sold out within the next several years after you gave this heavy bond to the Chicago Title and Trust Company?

Mr. PRICE: That question is objected to as improper cross examination and not based on anything brought out by direct examination.

The COURT: He stated that he had no other interest. It might be a legal interest if it was one and a legal liability under a warranty of his warranty deed when he conveyed these lots. Now, isn't it pertinent for them to find out whether he had any other interest?

Mr. PRICE: I don't think so in an inquiry of this character.

The COURT: Objection overruled.

To which the petitioner by its counsel then and there duly excepted.

22 Mr. MASON: Answer the question, please.

A. That is the fact, and I still insist that my answer is also the fact. The liability is the same.

Q. Oh, then, your liability on your warranty deed is the same as your liability on those bonds, is that right?

A. Why, it amounts to the same thing, certainly it does.

Q. Mr. Mecartney you did give those so-called heavy bonds to the Chicago Title and Trust Company in order to secure guaranty titles so you could sell the property, did you?

A. I certainly did.

Q. What is the extent, amount or penal sum of these bonds you speak of as having given?

A. I don't know, it may run into ten or twelve thousand dollars—six or eight thousand.

Q. So today you are liable under the bonds you gave to the trust company in order to secure guaranties of titles?

A. Unless limitations have by this time run against it, and I don't suppose they have; I am assuming that I am bound,—interested in this assessment; but I want to, if I may correct, your honor—when I referred to the only liability under my warranty deeds I had forgotten about the bonds; the bonds were given in order that the warranty deeds would go. I considered it the same liability.

Mr. MASON:

Q. You considered it the same liability although you had forgotten about the bonds, is that right?

A. I do consider it the same transaction. If I am not liable *on* my warranty bonds are void—if I am liable on my warranty I am liable on that and additional bond liability cuts no figure.

Q. Now, I will ask you, Mr. Mecartney whether, or where this so-called Speedway was in January, 1894, with reference to Lots 15 and 16?

A. That Speedway ground commenced from a little more than 29 feet east of the east lot 15, that is, east of the east lot of the

part taken in this proceeding, and was probably some sixty,
23 eighty or one hundred feet wide.

Q. That is the east line of 15 ran up to the west line of the Park, did it not?

A. Not of the actual Park; it ran up to the west line of an open twenty-nine foot street at that point.

Q. Was that so-called twenty-nine foot street within the park lines and within the confines of the Park?

A. It was not within the park lines or the confines of the Park; it had been an open street for years prior to that time, many, many years.

Q. Who controlled and owned that so-called twenty-nine foot street?

A. The public.

Q. Well, what do you mean by the public?

A. The city of Chicago.

Q. As a matter of fact that twenty-nine foot speedway was east of the west line of the Park and wholly within the confines of Washington Park, wasn't it?

A. I have never spoken of any twenty-nine foot speedway, and there was none there.

Q. Well, the twenty-nine foot so called street.

A. Repeat your question, please, where did you say that was?

Q. As a matter of fact the twenty-nine foot so-called street was away within the confines of Washington Park and under the control and jurisdiction of the Park Commissioners?

Mr. PRICE: I object.

A. It was nothing of the sort.

Q. Now, the Speedway proper, the west line of the Speedway lay how far east of the east line of lot 15?

A. Just about a little beyond the east line of the twenty-nine foot street there was a little hedge or marked ground between the two.

Q. Then this so-called twenty-nine foot street lay just east of lot 15 and just west of the Speedway?

24 A. That is exactly right.

Q. Now, was that a paved street in January, 1894.

A. It was.

Q. The whole twenty-nine feet?

A. It was.

Q. When was that pavement made?

A. In the beginning *on* September, 1893 and finished within a very few days thereafter.

Q. And that pavement is there now, is it?

A. It is.

Q. How wide is the roadway of that pavement?

A. Sixty-six feet.

Q. The roadway?

A. The Roadway, excuse me, well the roadway, well I don't know, I suppose it is about forty feet; it commences right east of the sidewalk line.

Q. And this property condemned extends the full or ordinary width of a roadway from that east?

A. There is no sidewalk on the east side of the street so it goes entirely east to the street line.

Q. There is a sidewalk at the west side of the street isn't there?

A. Yes sir.

Q. How wide?

A. I have forgotten the width, it is so many years ago I don't know.

Q. It is a six foot walk, isn't it?

A. I do not know, probably. The east walk of the parkway was small.

Q. Eight and three tenths feet wide isn't it?

A. I don't know, I suppose about that.

Q. And then east of the parkway is this roadway, paved roadway?

Mr. PRICE: I object to that as improper cross examination. It relates to conditions existing there today and not conditions in regard to which I examined the witness—the conditions as they existed in 1894. That is the matter under the consideration of the court now, not the present condition.

Mr. MASON: He has already testified that the walk which is there now was there in 1894. I asked him how wide it is and where it runs in reference to the street line.

Mr. PRICE: You are asking as to present conditions.

The COURT: Proceed, objection overruled.

To which ruling of the court petitioner by its counsel then and there duly excepted.

Mr. MASON:

Q. That paved roadway in January 1894 from curb to curb was about 37 or thirty-eight feet wide, wasn't it?

A. Well, it was at least that, Mr. Mason, but exactly the amount I do not know.

Q. Now, east of the east curb line of the roadway in January, 1894, was a parkway?

A. A speeding ground.

Q. Speeding ground?

A. Yes, sir.

Q. You mean that the speeding ground came right up flush with the east curb line of the roadway?

A. No, but very close to it.

Q. Well, what was the distance between the west line of the speedway and the east line of the roadway?

A. My best recollection is that at that time there was no sidewalk between the east curb line of the street as paved and the park; that the speeding ground commenced right there on a line of where there had been a fence at that time and at that time was a small hedge marking the west line of the speedway or speeding ground; then east of that came the speeding ground. Now the west line of the speeding ground might have been one to four feet or six feet

east of the curb when the street was paved, but it was not very far; the exact distance I do not remember.

26 Q. As a matter of fact wasn't it twenty-five and three tenths feet—wasn't the west line of the speedway twenty-five and three tenths feet east of the east line of the roadway?

A. Well, I don't think so and it would surprise me if that is a fact,—my strong impression is that it came right up close—it may be possible but it would surprise me if it was as much as that. My recollection is to the contrary.

Q. Now you made this subdivision did you in 1897, this Snow subdivision?

A. I did.

Q. At that time, prior to that subdivision, the lots faced north and south, lots 15 and 16?

A. Well fifteen and sixteen always faced north and south.

Q. Yes you turned them around when you subdivided them and fronted them east on South Park Avenue, did you not?

A. Well, I don't know that I turned anything around.

Q. That is where the Snow subdivision fronts.

A. That is obvious, yes, I think that is true.

Q. Exactly, now why did you resubdivide and face these lots to the east?

Mr. PRICE: I object to that question because it relates to a date three years, at least, later than the condemnation judgment and a point of time sixteen years later than the time in relation to which this case is being tried.

Mr. MASON: He has testified that a proportionate share of benefits of fourteen to eighteen per cent of the total benefits—he says ought to be assessed against this property, now, in getting at the proportionate share of benefits we have a right to consider the condition of the property in 1897, what it is best adapted for, what it is used for, if anything. Now, we propose to show when we come to our side of the case that in 1894, January, this property — susceptible of the uses that were afterwards actually made of it, that the property could best be put to. These uses—by subdividing it

27 and fronting it east on South Park Avenue, it was actually put to that use, and I say the question is material.

The COURT: Do you expect to supplement that testimony later?

Mr. MASON: Yes, your honor.

Mr. PRICE: This is cross-examination of my witness on evidence offered by me, and I submit it is entirely improper cross-examination on any question asked by me.

Mr. MASON: It goes to his estimate of the benefits.

Mr. PRICE: The question of benefits must necessarily relate in this case to the date of this condemnation judgment and not to what occurred later.

The COURT: I think the point well taken, Mr. Mason; it is not proper cross-examination.

Mr. MASON: Very well, I will bring that out on our case.

Q. Now, you say that the proper proportionate share of lots 15 and 16 except the part taken, is from fourteen to eighteen per cent of the total assessment, is that right?

A. I did on both tracts, the aggregate.

Q. Taking them together?

A. I so stated, yes sir.

Q. Now, fourteen per cent of the total assessments would be how much, have you figured it out?

A. Well, I have figured it many times, but I can figure it right here (after making certain calculations) Fourteen per cent would be $2,842.89.

Q. And eighteen per cent would be about——

A. Eight hundred dollars more.

Q. $3,700?

A. $3,600 that is right.

Q. What would be your opinion as to proportionate share of assessment properly chargeable against the south 150 feet of lots fifteen and sixteen except the east 37 feet taken by itself?

A. The south 150 feet of that sum of $2,800 to $3,600 should stand slightly more than a pro rata or a square foot proportion, as it was worth something more than the north halves, a little more; that is so by reason of facing on 56th street, which was some better street than Ross Avenue, and the proportion on those two amounts would be practically as I would think, three, as three is to four, that is three parts on the north part and four parts on the south part.

28

Q. Now you spoke of square foot proportion?

A. Yes.

Q. What do you mean by that, Mr. Mccartney?

A. Well, I mean to say that the north part being 120 feet north and south by 163 east and west as an entire tract would be worth less—or by the square foot would be worth less, worth less according to area than the 150 by 163 at the south, because the south park had a little better street to front on. When I say square foot I mean according to area.

Q. Well, have you determined the proportionate share according to area?

A. No, but I am trying to state that as between these two tracts if they were of equal area the south would be worth a little more, that is all I mean by that.

Q. Worth a little more you mean in value?

A. A little more in value.

Q. Then, have you taken the square foot into consideration in arriving at values in this case?

A. No, not particularly that I know of.

Q. Well, how have you used it?

A. You mean how have I arrived at my conclusion?

Q. In what way have you used or applied the element of square foot?

A. I do not know that I have applied it at all except to take the north piece and the south piece and to estimate that together they

should stand a certain amount and then as to that amount the north part should stand three parts and the south part four parts; and I find that by reason of the fact that the south part is worth more, a little, in area, than the north part, and is also smaller in
29 area; that is where the square foot comes in.

Q. What did you take into consideration in reaching your conclusion of fourteen to eighteen per cent on proportionate share, what elements did you take into consideration?

A. I took into consideration, and had to take into consideration this fact and this situation, that the entire property from Fifty-first street to Sixtieth street—assumed that that is to bear the burden of this cost, the total cost; that that entire mile of property with the exception of the two parts, the remainder of the two parts taken in lots 13 and 15, should stand two thirds of that assessment, and that those parts should stand one third, and that of that one third that lot 13 should stand half of that one third and those two should stand the other half of that one third, or approximately that, and possibly a little less—the south part a little less, which would give from fourteen to eighteen per cent.

Q. In other words, lots 15—that is the remainder of lots 15 and 16 and the remainder of lot 13 should stand one third of all the assessment one third of the total assessment?

A. If I understand your question——

Q. If I understand you, lots 15 and 16 and 13 should stand their proportionate share of one third of the total assessment; all other property in the roll outside of those two lots should stand two thirds of the total assessment?

A. That is right on a basis that the west half of that street should stand all.

Q. What do you mean by the west half of the street standing all?

A. I mean that on the basis—you tell me to assume that all private property on only one side of that street should stand the entire cost of taking that jog out of the street. I don't want to be understood as admitting that that is right on that basis.

30 Q. How much of this one third should be assessed against lots 15 and 16 as their proportionate share?

A. I said not over, or about one half of that one third.

Q. One half of the one third should go to 15 and 16?

A. That is right.

Q. And the other half of the one third should go to lot 13, is that right?

A. That is right.

Q. Now, in reac-ing the proportionate share that ought to be assessed against Lots 15 and 16, you have compared that proportionate share with the proportionate share against lot 13, have you not, in the ratio of one to two or two and a half

A. Yes, I have compared it, but I have not compared the—that is I have compared the benefits, yes, from those two lots with Lot 13, and I have then figured that Lots 15 and 16 together, that is the remainder of Lots 15 and 16 together were worth as much as the remainder of lot 13.

Q. In other words, to get at the proportionate share of lots 15 and 16 you have to compare that proportionate share of Lot 13, don't you?

A. Yes sir, and this is the way I arrive at it; that you should take the entire district assessed and that this jog in the street here, making a narrow street at that point was a definite damage to the whole mile of frontage and, hence, a definite benefit to the whole mile of frontage to have it removed—that that benefit increases from the extremes of that mile as it approaches the jog, and you therefore ought to take the property outside of the property from which a part is taken; treating that as one element or factor or sum or benefit as an aggregate, then take all of that from which the part was taken, and then in dividing that between the three parcels, that is the two parcels of Lots 16 and 15 and the one parcel of lot 13, you have to consider the relative balance of benefits as between those two.

31 Q. Now, I want to ask you how you got at that division of one third, total assessment, and two third total assessment; what elements you took into consideration, whether, for instance, you took into consideration the area of all the lots assessed in the roll; whether you took into consideration the value of all lots assessed in the roll; whether you took into consideration the front footage of all the lots assessed in the roll; whether you took any or all of these elements into consideration in reaching this one third and two third basis which you have referred to?

A. I do not know that I can follow your question, but I can tell you what I did consider again.

Q. If you don't follow the question I will ask it over again.

A. I don't think I can follow it then, it is pretty long.

Q. You have reached a basis here of proportionate share of one third and two thirds?

A. That is right.

Q. What elements did you take into consideration in reaching the one third basis? Did you take into consideration area values, frontage, location or what not, or is it a purely arbitrary one third?

A. It may be considered arbitrary, but I don't feel that it is so, and I did take into consideration frontage on streets, the depth that the lots actually had and did have on that street—some a little shallower than others. I considered that the whole mile was benefited and I considered that the whole mile was damaged, and I considered values as of that time.

Q. Anything else?

A. I considered as an element the character of the street and I considered——

Q. Anything else?

A. Distance from the improvement.

Q. Anything else?

A. I don't recollect at this time anything else; and I considered as between Lots 13 and 15 and 16 that there was no sub-

32 stantial difference in the improvements on those lots in valuation unless it was in favor of lots 15 and 16, but that was very slight.

Q. All right, anything else?

A. I should say there, as I think I did say, that on Lot 13 there was only a one story peanut World's Fair shanty, which was removed shortly after that time. I do not remember anything else, Mr. Mason, except that I considered the questions of the lateral streets that were upon it at that time and the whole general situation.

Q. That is all you took into consideration, is it?

A. Well, that is all I remember.

Q. Well, now, let's look at the frontage a moment. What is the frontage of Lots 15 and 16 on this improvement?

A. The east side of the south parcel of Lots 15 and 16, as I said before, is 150 feet north and south it is 163 feet east and west. The north part is 120 feet north and south and 163 feet east and west.

Q. What is the frontage of lots 15 and 16, or as they were later known Snow's Subdivision on the improvement, what is the frontage in feet?

A. I have answered it.

Q. 270 feet isn't it?

A. That is right, the total.

Q. Now, what is the total frontage of the lots on this improvement, not on this improvement but in this roll, what is the total of the frontage on the whole property there?

A. On the whole property described in the roll it is five thousand, two hundred and some feet?

Q. 5,270 feet?

A. Well, it is a mile; a mile is 5,280 feet, something like it; less, considering intersections.

Q. Did you compare your individual frontage with the total frontage shown by this roll?

A. I compared it with a mile frontage less streets.

33 Q. What is the depth of the Snow and Company lots?

A. 163 feet as said before, except that there is an alley there, we left the alley there; I have forgotten whether it is fourteen feet.

Q. What is the depth of all the other lots assessed in this proceeding?

A. Some are as low as 125 feet and some are 150 and there are different depths, some I think are deeper than that.

Q. Do you know anything about the depths?

A. Well, I have studied it over and did know and from time to time forgotten. I could tell particular streets. I know the lots right south of this are a little shallower than ours. I know some south, further south are nearly as deep as ours, and I know most of them are 150 feet; that is my recollection.

Q. You took into consideration the values, did you, of all the other lots assessed in this roll?

A. I did.

Q. Are those uniform values?

A. No, they are not absolutely uniform but that general district, running from 51st to 60th street was at that time of the same general character, namely, residence property and varying at different points to some extent.

Q. Garfield Boulevard was there then was it?

A. It was.

Q. What is the range of values that you took into consideration?

A. What range of values did I take into consideration?

Q. Yes, they were not all the same.

A. How is that?

Q. The range of values—the values were not all the same were they?

A. No, the values were not all the same.

Q. What is the range you considered on lot values?

34 A. Well, there was property at that time down near from 51st to 56th street that ran all the way, the whole property would run all the way from $125 or $150 a foot to $250 a foot—$200 to $250. There might have been some of it worth $250 a foot, but that would relate only I guess to Lot 13 and facing north; there was no property in 1894 facing South Park avenue that would be worth $250 a foot, not quite.

Q. The range was from $150 to $250?

A. I think the range facing South Park Avenue from $130 or $140 a foot to $200.

Q. Facing South Park, facing the boulevard what would it run?

A. Facing the boulevard it was worth a great deal more.

Q. How much?

A. Well, I would think that piece facing South Park was worth $400 a foot. It was worth that I know in 1893 and I think it depreciated a little but not much.

Q. $400 a foot?

A. Yes, facing north on Garfield Boulevard.

Q. Worth $400 a foot?

A. Yes sir.

Q. Now, you took into consideration in determining the proportionate share, the location of all the other pieces of property assessed in this roll?

A. I think I have looked over the roll and took it into consideration as well as I could.

Q. The location differs with different pieces?

A. It differs to some extent, but not much, except fronting on Garfield Boulevard.

Q. You took into consideration the character of the street?

A. I certainly did.

Q. What character did you assume it to have in your consideration?

35 A. Well, it had the character of a through street in which the jog there was a definite damage to the property there for a long distance along, extending along this——

Q. Did you take into consideration something beside the character of the street; you took into consideration this so-called damage, didn't you?

A. I took into consideration that if this was a benefit it must have been a damage; if it was a benefit from the opening, it must have been a damage before and it certainly was.

Q. So this opening was a benefit unquestionably, was it not?

A. To the property, the street?
Q. Yes.
A. No question about it.
Q. No question about it?
A. None at all.
Q. Now, you testified as to the proportionate share of the cost; you understand that to mean proportionate share of the benefits, do you not, Mr. Mecartney?
A. Proportionate share of the benefits?
Q. Yes, you used those two terms interchangeably, don't you?
A. No, I mean—I use the proportionate share of the benefits, the entire benefits from this property. I don't admit that that roll gives the real proportionate share at all of the benefits.
Q. I don't want you to admit anything; but don't you use the phrase "proportionate share" of the cost synonymously with the phrase "proportionate share of the benefits?"
A. I do not, except that if I am compelled to assume that all benefits before that street opening is to be as conclusively assumed to be placed upon one-half of the street, then my estimate is given on the question of benefits, but I am—as I am told to assume that, absolutely, I say that the proportion of the cost of that should be placed, as I have stated, upon this property, in my judgment.
36 Mr. MASON: Let us get back to the question, please. Don't you use the phrase "proportionate share of the cost" as the equivalent of the phrase "proportionate share of the benefits" in giving your testimony?
A. I do not, except——

Mr. PRICE: One might think it was time to cut this short. Mr. Mason has asked him the question repeatedly, in different forms, and the witness has answered it fully. I object to repetition on cross-examination.

Mr. MASON: I am entitled to a clear answer to that question.
The COURT: He was about to answer fully and was answering it.
The WITNESS: I am willing to answer it.
Mr. PRICE: I am trying to protect the court and the rest of us, and not have the time wasted here.
The WITNESS: I say that assuming the total benefits in this sum of twenty thousand dollars has to the one-half of the property lying on the west side of that street, then my estimate is that the benefits to this property, compared to the benefits to the entire district assessed is fourteen to eighteen per cent on those two pieces. In that sense I use it interchangeably, but if you ask me whether or not this property should stand fourteen to eighteen per cent of the actual benefits which I believe to have assumed there, I say No, that is wrong, but I am compelled to assume it.
Q. Exactly; you understand as a property owner and as a lawyer, do you not, the proportionate share of the cost means the proportionate share of that assessment as shown by the roll, do you not?
A. Assessment as shown by the roll, yes.

Q. And in answering that question, proportionate share of the cost, you confine your answer to the facts disclosed by the roll; isn't that so?

A. I have repeatedly so stated.

Q. Now, what was the fair cash market value of lots 15 and 16 in January, 1894?

37 A. It was in the neighborhood of $50,000.00, the entire two lots as private property. It was in the neighborhood of $50,000.00 and on a falling market, at that time.

Q. I am speaking about the fair, cash market value now, $50,000.00?

A. There would have to be a slight allowance then for proper market—a falling market—you have asked me now, as I understand it, the full value of the entire lots 15 and 16.

Q. Exactly. $50,000.00, in January, 1894?

Mr. PRICE: Is that including the thirty-seven feet which were not then condemned?

A. I have included the entire piece of property.

Mr. MASON: Leave out the thirty-seven feet; we are getting at the value of fifteen and sixteen in January, 1894, after we condemned the East thirty-seven feet.

Mr. PRICE: Had not been condemned at that time.

A. I have asked you, Mr. Counsel, twice whether you meant the entire lots 15 and 16 and you have answered that you did.

Mr. MASON:

Q. Excepting the East thirty-seven feet?

A. Except the East thirty-seven feet at that time?

Q. Yes.

A. It would be about thirty-three thousand or thirty-four thousand dollars.

Q. Now, how much a front foot was that on Fifty-Fifth Place?

A. Why, let me see, 120 x 163 feet on 55th Place, in January, 1894, well, do you mean facing—you say facing 55th Place?

A. That is North?

A. Per front foot, facing North? Well, I will have to figure a little bit.

Mr. MASON: I want to find how you reach that total value.

A. Fronting North—taking the frontage on Fifty-Fifth Place, it would be in the neighborhood of only $100.00 a foot; the

38 South part, fronting south on 56th street, that frontage would be about $140.00 or $150.00 a foot; I think maybe that is a little high—about $130.00 a foot.

Q. $130.00?

A. Yes.

Q. That produces this total value of $33,000.00 or $34,000.00, does it?

A. Yes, sir.

Q. Now, in January, 1894, there was this old World's Fair Building on this property, was there not?

A. There was.

Q. What, at that time was the best use to which that property could be put?

A. You mean the Fair building?

Q. What was it most available for?

A. You mean the building?

Q. No, the property, the land?

A. Why, it was residence property.

Q. Residence property; was that a residence neighborhood, at that time?

A. It was.

Q. Rather high class residence neighborhood?

A. It was a good, growing high-class residence neighborhood property.

Q. A desirable residence neighborhood, that is because it abutted on the park?

A. That had something to do with it, considerable to do with it, that was an element of value.

Q. What was the best way, in January, 1894, to improve that property, I mean what kind of buildings could be put on the property to the best advantage and which way would they face?

A. Why, the better frontage for that property was facing the park, facing South Park avenue.

Q. And you, pursuant to that idea, subdivided it in 1897 to front the park?

39 A. I did.

Q. And then you sold out different pieces in Snow's subdivision to other people?

A. That is right.

Q. Did you not?

A. That is right.

Q. And buildings were erected on the different lots in Snow's subdivision?

A. Yes, sir.

Q. Will you describe those buildings, please, beginning with lot Number one at the North end and going south?

Mr. PRICE: That question is objected to as improper cross-examination. The evidence in chief did not relate to the present condition of that property at all and it is immaterial to this hearing.

The COURT: I will have to sustain that objection, Mr. Mason.

Mr. MASON: Very well.

Q. Now, Mr. Mecartney, there is no question in your mind, is there, but what this opening enhances the value of lots fifteen and sixteen, except the East thirty-seven feet?

A. Treating the East thirty-seven feet as if it had been private property and then was opened as a street is that what you mean?

Mr. PRICE: Treating it as belonging to either——

Mr. MASON: No, let me ask the question. There is no question in your mind, is there, Mr. Mecartney, but what lots fifteen and sixteen except the east thirty-seven feet described in that condemnation judgment was a benefit, that is increased in value by this opening?

A. The remainder of the property, of lots fifteen and sixteen, with the exception of the street portion treated as two separate pieces of property privately owned, having no frontage on the park, by acquiring frontage in South Park Avenue by the taking of this thirty-seven feet undoubtedly was benefited by that opening.

40 Q. How much a front foot was that remainder increased in value on its South Park frontage, two hundred and seventy-feet, by the opening?

A. Well, the tract—I could only estimate that or only have estimated it confining it to the two pieces as an entirety, because they were an entirety at that time.

Q. All right, take them as an entirety, having a frontage of 270 feet on South Park Avenue and having a depth of one hundred and sixty-three feet how much were they respectivelly valued per foot by that opening?

A. I would say that the one tract—the North tract——

Q. That is the north one hundred and twenty feet?

A. The north one hundred and twenty feet would be less than the other. I would think that the north one hundred and twenty feet was benefited fully $1,300.00 or $1,400.00; the other some $1,600.00 or $1,800.00.

Q. How much a front foot was the North one hundred and twenty feet increased in value by the opening?

A. Well, that would be a matter of figuring. I think it may amount in the neighborhood of $10. a foot, something like that.

Q. Figure it out and see?

A. That figures $10.00 or $12.00 a foot, something like that. I think it was benefitted at least fully that. I think there was a slight—there was some difference between the proportionate benefit and the actual benefit.

Q. What difference is there.

A. I think the actual benefit to both of those properties, the proportionate benefit which I have mentioned, measured out fourteen to eighteen per cent to twenty which is in the neighborhood of $3,000.00 to $32,000.00.

Q. How much is the actual value?

A. And the actual benefit, I think, was at least that and may be a few hundred more.

Q. Well, how do you get a larger actual benefit than proportionate benefit?

41 A. Why, I believe that the opening was a benefit to all property and that it was a benefit to all the property in the neighborhood on both sides of the street and North and South and that there ought to be some profit in the opening.

Q. In other words, in figuring you- proportionate benefits, you have taken into consideration the alleged benefits to property not assessed in this proceeding?

A. No, not in the proportionate benefits.

Q. In the actual benefits, have you done that?

A. No, not in the actual benefits, excepting that I have said that the actual benefits in my judgment is apt to be some few hundred more than this total amount of $33,000.00 which I figure.

Q. You mean the actual benefit to what?

A. To these two tracts, two pieces of fifteen and sixteen.

Q. Mr. Mecartney, if these pieces were actually benefitted the amounts which you have stated on what theory were they benefited?

A. Why, on the theory that there was a piece of property 150 x 163 feet on 56th Street fronting south that by an additional frontage on the East there was a definite benefit to the market value of the property and the frontage which was on South Park Avenue was worth slightly—very slightly more than the frontage on 56th Street at that time. In other words, you had a piece of property 163 feet fronting south with 150 feet except towards the North, which was—a part of which—well, all of which was given an additional side or front by the opening and it would enable you to face the lots on South Park avenue that one hundred and fifty feet. You would have the advantage of that total facing the lots south on Fifty-sixth street which was about the same, but a slight advantage at that time As that piece of property was held, you could subdivide the lots facing South on 56th Street, you could get as much for each of those lots, within a slight margin of what you could get for inside lots, facing East with the exception that the corner lot facing south and being the extreme west lot would be worth decidedly more
42 because it would have—it would have light on two sides instead of one and a slight advantage in fronting. In other words, if you take a plat and figure out the value of that piece of property, consider you are dividing it into lots facing North, and South and estimate what they would bring on the market if there had been an active market, then you take the piece with the street opening and draw your lines East and West, consider what you can get for them, there would be a margin of which I spoke and it would be a benefit.

Q. You spoke of the difference in value between the South Park frontage and the Fifty-Fifth Place street?

A. 55th Street?

Q. Fifth-Fifth Street frontage; the South Park frontage was worth how much more than the Fifty-Fifth place frontage?

A. At that time, I think the South Park frontage on the same width street would be worth $5, or $6, a foot, possibly more than the 56th Street frontage, and maybe no more. 56th Street was a very good street, I think a little more, slightly.

Q. You gave 56th street frontage value at $130.00 a foot?

A. Yes.

Q. You would make the South Park frontage $135.00 or $136.00?

A. That is right.

Q. You gave your Fifty-Fifth place frontage a value of $100.00 a foot; how much more would South Park frontage be worth?

A. That would be worth, I would say $6.00 or $7.00 a front foot more.

Q. Now, in the assessment roll before this jury, Mr. Mecartney, this Snow & Company's subdivision is assessed as follows: Edgar M. Snow & Company's subdivision (except the East 37 feet of lot 15 and all of lot 16, sub-lot one assessed in the name of Frank J. Willoughby and being assessed $1,460.04; how much in your opinion will that lot be benefited by this improvement.

A. I have not figured out the lots in Edgar M. Snow &
43 Company's subdivision lot by lot and have made no other estimate so far except on these two parcels as they existed in 1894. Taking the basis of that total estimate of benefit to the proportion of benefit which I have given and examining the roll which I have, it seemed to me that the assessment in proportion to the lots is not substantially inaccurate. It seems to me it is properly distributed.

Q. Will you answer my question, how much will sub-lo' one in Edwar M. Snow & Company's subdivision be enhanced in value by this improvement?

Mr. PRICE: I assume Mr. Mason intends to make Mr. Mecartney his own witness on that subject. I did not examine him on that subject, the benefits of the property. I have no objection to your answering the question, with that understanding.

Mr. MASON: It is not a question of my making him my own witness it is in the record here before the jury——

The COURT: Objection overruled.

To which ruling of the court, counsel for objectors then and there duly excepted.

A. I have not considered that, but I will if you want me to.

Mr. MASON:

Q. I wish you would.

Mr. PRICE: The court will remember that I did not examine Mr. Mecartney as to benefits to the property, only as to proportion.

Mr. MASON: I will stop right here if it is stipulated in this record what Mr. Mecartney has been testifying to is proportionate share of the benefits and he has not said a word about benefits. If that is the understanding, I will stop cross-examining right here. Will you agree to that?

Mr. PRICE: I didn't ask anything about special benefit which this property or any part of it would get from this improvement. I only asked him what the proportion of benefits would accrue to this property or had accrued rather—no, will in this case.

Mr. MASON:

Q. Have you figured the benefits now?

44 A. Let me see your plat, please, if I may. I have not estimated what the total benefit—do you ask me as to lot one only?

Q. Yes, sub-lot one, Snow's Subdivision; how much would it be benefited by this improvement?

A. I have not estimated it because it was not in existence then.

Q. Well, it is in existence now, Mr. Mecartney, in this roll before this jury and you are here objecting to it. Now, I ask you if you have any opinion as to the benefits to that sub-lot one by this improvement, have you or have you not?

A. I have not at this time an opinion; nor I have not studied that plat and made any estimate in regard to it.

Q. Have you an opinion as to the benefits to sub-lot two?

A. No.

Q. Or sub-lot three?

A. Well, I have to stop and make an estimate. I have not done it and I have not at this time any such estimate, no sir.

Q. Then at this time, you haven't any opinion and don't express an opinion?

A. I do not.

Q. As to benefits from this improvement to the property described in this roll, to-wit Lots 1 to 8 in Snow's subdivision?

A. I do not. I have not considered it.

Mr. MASON: That is all.

Redirect examination.

By Mr. PRICE:

Q. Mr. Mecartney, in answering one of Mr. Mason's questions, you stated that before this condemnation occurred and before the thirty-seven feet were taken for the opening of this street that the property was worth—the whole tract lots 15 and 16 were
45 worth $50,000.; that after the property had been taken the remainder of those lots 15 and 16 were worth from $33,000.00 to $34,000. only?

A. That is right, yes sir.

Q. Whereas it appears by this condemnation verdict you were only allowed $7,474.78 for the part actually taken. How do you explain the discrepancy between that testimony?

Mr. MASON: I object to his explaining any so-called discrepancy. I object to counsel dragging in before this jury any of the issues that were litigated in the condemnation suit. I object to his attempting directly or indirectly to show to this jury that a proper or improper amount was allowed as compensation in the condemnation suit and I object to his directly or indirectly——

Mr. PRICE: I suggest that Mr. Mason be rebuked for trying to make a speech to the jury, insinuating that I am trying to tote unfair in this case. I have not asked but one question here; let him object to that and keep still.

The COURT: Let him state his objection.

Mr. MASON: Continuing my statement of my objection,—I object to counsel directly or indirectly attempting to drag before this jury the question of whether there were any damages to the remainder of lots 15 and 16 and whether, if any damages were allowed, they were proper or improper. In other words, I insist under the decision of your Honor and the Supreme Court that all issues in the condemnation suit were litigated there finally, once and for all and they can't directly or indirectly be dragged into this hearing before this jury.

Mr. PRICE: Mr. Mason is assuming a whole lot of things which I have not asked in the definite question. If he wants to object to that, it is proper but it is not proper to make a stump speech here.

Mr. MASON: The tendency of the question is very plain.

46 The COURT: I sustain the objection.

To which ruling of the court, counsel for objectors then and there duly excepted.

Mr. PRICE: I will suggest to the court that this matter is new matter brought out by Mr. Mason entirely, and it is certainly proper matter for Mr. Mecartney to explain, if he desires to do so.

The COURT: I don't so regard it. The objection is well taken, in the opinion of the court.

To which ruling of the court, counsel for objectors then and there duly excepted.

Mr. PRICE: I think that is all.

Mr. MASON: That is all.

The COURT: Call your next witness.

* * * * * * *

47 OLIVER L. CHADWICK called as a witness in rebut-al on behalf of Petitioner being first duly sworn, testified as follows:

Direct examination.

By Mr. MASON:

Q. What is your name?

A. Oliver L. Chadwick.

Q. What is your business?

A. I am in the real estate business.

Q. Where is your office?

A. 107 Drarborn Street. We also have a branch office at 55th street.

Q. Are you in a firm?

A. I am with Mr. Charles A. O. Standish, yes sir.

Q. How long have you been in the real estate business?

A. I have been in the real estate business altogether about fourteen years.

Q. And where have you handled property, the City of Chicago?

A. Most all South Side property.

Q. Where do you live?

A. I live on Sixty-second street in what is known as the division of the city called Woodlawn. I live between Greenwood and Ellis Avenue, on Sixty-second street in Woodlawn.

Q. What is your house number?

A. 1019.

Q. Sixty-second street?

A. Yes sir, Sixty-second street.

Q. That is between what other streets?

A. That is between Ellis and Gre*n*nwood avenue.

Q. That is the old town of Hyde Park?

A. It is part of the Town of Hyde Park.

Q. How long have you lived there, Mr. Chadwick?

48 A. Since 1898; twelve years.

Q. How long have you known this general locality in question here?

A. Since 1880.

Q. Have you sold and handled property and listed property in this locality?

A. Yes sir.

Q. Have you examined the property in question here?

A. I have.
Q. Lots one to eigh-, Snow's Subdivision?
A. Yes.
Q. How long have you known that property?
A. Well, I have known it, in a general way since 1880 but I have been more familiar with it since 1892.
Q. In what way do you mean known it more particularly?
A. Well, I can't say that prior to 1892 that I ever took any particular notice of this property.
Q. Have you taken particular notice of it since 1892?
A. Yes sir.
Q. Have you examined it for the purpose of testifying in this case?
A. I have.
Q. When?
A. I have examined it recently two or three times within the last ten days.
Q. Did you know its physical condition at the time the condemnation judgments were entered in this case in January and October, 1894?
A. Yes, generally, but not specifically.
Q. You heard the testimony of the different witnesses as to the physical condition at those two dates?
A. Yes sir.
Q. Now, do you know what this opening is?
A. I do.
Q. What is it?
49 A. Why, this opening is a condemnation or taking of a strip thirty-seven feet wide in reference to this property between Fifty-Fifth Place and Fifty-sixth Street. It is a strip of land thirty-seven feet wide by two hundred and seventy feet long, South Park Avenue——
Q. That all there is to the opening?
A. I addition to that, there is also a strip between Fifty-Fifth Street, Garfield Boulevard or Fifty-Fifth Street Boulevard, a strip thirty-seven feet wide and one hundred and thirty four feet long between Fifty-Fifth Street and Fifty-fifth Place.
Q. When was Garfield Boulevard established, if you know?
A. I could not say.
Q. Well, about how long ago; was it a boulevard at the time of these condemnation judgments?
A. Yes sir, it was.
Q. Did you know that general locality at that time?
A. I did.
Q. Were there any streets opened in that locality west of South Park avenue at that time, North and South streets?
A. Well, yes; there was some open.
Q. Any East and west streets open?
A. East and west?
Q. Yes.
A. Yes.
Q. Any north and south streets open?
A. Yes.

Q. Now, have you an opinion as to the fair, cash market value of lots fifteen and sixteen (except the east thirty-seven feet) as of the date of those two judgments of condemnation?

Mr. MASON: The question is objected to on the ground that the witness has not qualified to express an opinion.

Mr. MASON: He has handled property on the south side in that locality.

Mr. PRICE: Only in the real estate business the last four-
50 teen years, which was subsequent to the time he testified about the value.

The WITNESS: I was in the real estate business all this time and 1894.

Mr. PRICE: Your testimony was you had been in the real estate business fourteen years; that would be 1886.

The WITNESS: Altogether, I said.

Mr. MASON:

Q. When did you first go into the real estate business?

A. I was in the real estate business, I was with the Pullman Company as far back as 1882, up to 1893. In the latter part of 1893 I went into the real estate business and was in the real estate business until the last of 1896, had offices in the Chicago Opera House, Chadwick & Ellert. At the time of the condemnation, I was in the real estate business.

Q. From 1896 on, what did you do?

A. From the lat-er part of 1896, December, until 1907, I was a deputy clerk in the Circuit Court, this court.

Q. What judge?

A. I was principally with Judge Tuley, most all that time I was his Minute Clerk.

Q. Now, have you an opinion, Mr. Chadwick, of the fair cash market value of the property in question at the time the judgments in condemnation were entered?

A. Yes sir, I have an opinion.

Q. I wish you would state that carefully, please?

Mr. PRICE: What property are you asking for?

Mr. MASON: Lots fifteen and sixteen, except the east thirty-seven feet.

A. In my opinion, that property, prior to the time of this opening—this street opening was worth one hundred and twenty dollars a foot frontage on South Park Avenue; which makes the remaining parts of lots fifteen and sixteen, after this thirty-seven foot strip is taken, worth in my opinion, or the total of it before the opening I think—or that part of it that was left after the opening,—that part
of it in my opinion, was worth $32,400.

51 Q. How much was that property which I have described worth per front foot on South Park Avenue before the opening?

A. One hundred and twenty dollars a front foot in my opinion.

Q. And that made 120 x 270, that is thirty-two thousand four hundred dollars?

A. Yes, sir.
Q. Before the opening?
A. Yes sir.
Q. How much was that property worth after the opening?
A. In my opinion, that property was worth after the opening $40,500.00.
Q. How much is the difference of benefit there?
A. $8100.00.
Q. You understand the benefit to be the difference in market value before and after the taking, do you?
A. I do.
Q. Do you know what was the value of that property before the opening, measured by its frontage on Fifty-Fifth Place?
A. I think it was less than that.
Q. What was its fair value before the opening, measured on its frontage on Fifty-sixth street?
Mr. PRICE: Less than what?
A. Less than thirty-two thousand four hundred dollars.

Mr. MASON:

Q. What was its value measured by its Fifty-sixth street frontage before the opening?
A. It was also less than thirty-two thousand four hundred dollars.

Mr. PRICE: I move to strike out the question and answer as unintelligible. I don't know how you could fix the difference in value of property when you look at it from one street and another street.
The COURT: You are not doing that, as I take it?
Mr. MASON: No, not at all.
The COURT: Motion denied.
52 To which ruling of the court, counsel for objectors then and there duly excepted.

Mr. MASON:

Q. What sort of a street was Fifty-Fifth place or Ross Avenue at that time?
A. At that time it was just a very deep sand opening. There was no street there.
Q. How wide, apparently?
A. Sixty feet.

Mr. PRICE: What time is this witness testifying about?
Mr. MASON: At the time of the condemnation judgments, just before and just after.

Q. What was the physical condition of Fifty-Sixth street at that time?
A. Well, about that time, Fifty-Sixth Street was paved with old cedar blocks. It might have been a little bit—it was about that time. I can't give the date exactly.
Q. Which was the more valuable frontage at that time, Fifty-fifth Place or Fifty-Sixth street?
A. Fifty-Sixth street.

Q. What class of property was that in 1894 at the time indicated?
A. The same class of property as it is now.
Q. Residence?
A. It was residence property.
Q. Do you regard it as high-class residence, low or what?
A. Why, after this opening was put through, it would be considered high class residence property.
Q. What was it before the opening?
A. It would not be considered high-class property, but obstructed property.
Q. In what way was it obstructed before the opening?
A. It was obstructed because it was shut off from being—couldn't be considered as property on a high-class street.
Q. Why not?
53 A. Because the street that,—a part of it was obstructed, was not opened.
Q. In what way was it obstructed?
A. It was obstructed by having thirty-seven feet stick out into the middle of the street.
Q. What street?
A. South Park avenue.
Q. How wide was South Park North and South of this opening?
A. Sixty-six feet.
Q. What was there instead of this thirty-seven feet?
A. There was twenty-five—there was twenty-nine feet there, or there was simply some wagon tracks or wagon-road there, as I remember it.
Q. Any trees on that?

Mr. PRICE: I would like to inquire what time you are asking about, Mr. Mason.

Mr. MASON: I am asking just before and just after.

Mr. PRICE: Which one, just before or just after.

Mr. MASON: One at a time; just before the condemnation—within a reasonable time before the condemnation.

Mr. PRICE: Fix the date at the time of the condemnation, that is the question involved here.

Mr. MASON: We have, if your Honor please—benefits have got to be measured with relation to the physical situation before and after the opening; how much was the land worth before the opening and how much was it worth after the opening. Now, in getting at the value before the opening, I have a right to go into the physical condition which affected that value. I may not go, perhaps, back into the eighties or the seventies but I certainly ought to go back to the time that Mr. Mecartney—that is I ought to be permitted to go back to the time Mr. Mecartney mentioned when that twenty-nine feet was a dirt road, or what Mr. Mecartney called a street. That was before the opening and it affects the value before the opening and it is necessary to have the value before the opening as one of the elements in the equation.

54 The COURT: It is all right for you to go back to the time that Mr. Mecartney testified to; but on your objection, I lim-

ited them to about the time of the entry of the judgments in this case, the early one in January, 1894 and I would have to so rule with you.

Mr. PRICE: Mr. Mecartney probably will remember correctly. Mr. Mecartney spoke about the street being paved there in 1893, September, 1893. Just prior to that paving, he testified there was a twenty-nine foot street in there east of the thirty-seven foot strip and he insisted it was a public street I asked him if it was not part of the park lands,—no, it was a public street.

The COURT: Well, as I recall——

Mr. MASON: Now, regardless of the question of time with reference to the value, I submit I have a right to rebut that testimony.

The COURT: Yes, but haven't you tried to change your front about the proposition, that is what you are doing.

Mr. PRICE: That question was called out by Mr. Mason on cross-examination.

The COURT: You limited the inquiry of Mr. Price in this matter and insisted upon its being limited to about the time of the entry of these judgments. On the question of Mr. Price, I said I limited it to the earlier judgment, which was January, 1894.

Mr. MASON: Very well. I can get at it in another way.

The COURT: Confine yourself to that time, now.

Mr. MASON: Yes sir.

Q. In January and October, 1894, the roadway was paved as it is now, was it not?

A. Yes sir, I so remember it.

Q. And how far from the street line is the west line of that roadway to-day?

A. How far from the lot line?

Q. Is the west side of the lot?

A. Why, it is fourteen foot.

Q. How wide is the roadway?

55 A. Thirty-eight feet.

Q. That is fifty-two feet?

A. Yes sir.

Q. That goes fifteen feet beyond the thirty-seven foot strip?

A. Yes sir.

Q. Does it not?

A. Yes, sir, that would be—yes, fifteen feet.

Q. Now, are you able to state whether or not that fifteen feet lying east of the thirty-seven foot strip was park land or city property at the time that these judgments were entered?

Mr. PRICE: If he knows of his own knowledge.

The COURT: We will assume that is the way he is answering.

A. I can't state from my own absolute knowledge.

Q. I will ask you to state the appearance of that strip in 1894 lying east of the paved roadway?

A. The appearance was—it was park property.

Q. What was the appearance?

A. That it was a part of the South Park property.

Q. Was it graded?

Mr. PRICE: I object to that.

A. It was—no, sand, as I remember it, it was mostly sand.
Q. Any trees in there?
A. I don't remember any trees in there at that time.
Q. Now, Mr. Chadwick, take lots fifteen and sixteen again, you say they will be benefited Thirty dollars a front foot on South Park Avenue, or a total benefit of $8100. I will ask you to state whether in your opinion that assessment exceeds the proper proportionate share of benefits that ought to be assessed against this property?
A. I do not think that it does.
Q. Why not?

56 A. Because I think that this property of all the property assessed in this roll should bear the burden of the expense of opening this street.

Q. Why?
A. Because it is the property which receives the greatest benefit.
Q. How?
A. Because of its situation.
Q. Now, I call your attention to fifteen and sixteen as subdivided, lots 1 to 8 as described in this roll, and ask you to state whether in your opinion those lots have been assessed more than they will be benefited in this improvement?
A. I do not think they have.
Q. Have they been assessed more than their proportionate share of the cost of this improvement?

Mr. PRICE: I object to the question as leading and suggestive to the witness.
Mr. MASON: That is not leading, whether they have been assessed——
The COURT: Objection overruled.
To which ruling of the court, counsel for objectors then and there duly excepted.

Mr. MASON:

Q. Have they been assessed more than their proportionate share of the cost of this improvement?
A. In my opinion they have not.

Mr. MASON: That is all, Mr. Chadwick.

Cross-examination by Mr. PRICE:

Q. You have been in the real estate business of- and on since 1880, you say, Mr. Chadwick?

57 A. Yes sir, I was since 1880. I helped lay out the town of Pullman in 1880, had charge of their real estate.

Q. Have you lived in Chicago during all of that period, during all of that time?
A. I have.
Q. Have you been a licensed broker all that time?
A. I have not.
Q. Have you been a licensed broker at any time?
A. Yes sir.

Q. Are you a licensed broker at the present time?
A. Individually I am not. I work under the license of Mr. Standish.
Q. Mr. Standish is in the same office with you?
A. Yes sir, we are together.
Q. Are you business partners?
A. No, I am the salesman of the firm.
Q. So you have no right to do real estate business in Chicago under your own name?

Mr. MASON: I object. This is not material. This isn't a criminal prosecution for violation of the City ordinance; no question of moral delinquency involved here.

Mr. PRICE: I am not suggesting that. If you have got any stump speeches to make, make them. I am inquiring for some facts regarding the credibility of your witness and his testimony; maybe you are not pleased——

Mr. MASON: I am always pleased with what you say. You are asking for a conclusion and I object.

Mr. PRICE: I am asking for his credentials.

The COURT: As to his right to do business, that is a question that is not involved, as I see it.

Mr. PRICE: He testified that he was acting under another person's license. I call attention to the fact that a City license only
58 authorizes the person named in it to do business, unless it is issued to a partnership, possibly might in that case.

The WITNESS: Yes, every employee under him does business under that license.

Mr. PRICE: Any business you do, you do under another man's license?

A. I do through Mr. Standish, yes sir.
Q. How long have you been in the real estate business this last period?
A. Since 1907.
Q. For three years?
A. Yes.
Q. Prior to that time, how long had it been since you were in the real estate business?
A. Ten years.
Q. Where were your office- located in 1894?
A. In the Chicago Opera House block.
Q. Who were you with then?
A. The firm was Chadwick & Ellert.
Q. Who?
A. Ellert,—E-l-l-e-r-t.
Q. Since you have returned to the real estate business the last three years, Mr. Chadwick, you have been mainly employed by the city, have you not, as an expert witness in special assessment cases?
A. No.
Q. Have you not been employed continuously since that time?
A. No.
Q. On special assessment cases?

A. I have not.

Q. That is, haven't you been one of the men who has been called by the city whenever they had special assessment cases to try, to testify in favor of the city?

59 A. A part of that time. You said all the time. I say, No,——

Q. How long have you been regularly in that employ?

A. Well, it is something over—about two years.

Q. And you are paid by the city for testifying in cases similar to this, are you not?

A. I am.

Q. Are you paid for your whole time or just paid on each case as you are employed in it.

A. Paid on each case, as we are employed in it.

Q. About how many cases have you testified in for the city in the last two years?

A. You mean condemnation cases?

Q. Condemnation and special assessment cases, both, because this is a special assessment case and not a condemnation case?

A. I suppose I have testified in seventy-five, perhaps more.

Q. In all cases for the city, to sustain the City's contention—is that not true?

A. I think I have not testified for the objectors.

Q. Mr. Chadwick, did you ever make a special assessment roll yourself?

A. I never did.

Q. Never had any experience in spreading special assessments yourself as an original proposition?

A. No, I did not spread any assessments.

Q. Where is your present office?

A. 107 Dearborn street, as I explained with a branch office at 55th st.

Q. Who runs the branch office?

A. We have a gentleman down there by the name of Mr. Baker that has charge of the 55th street office.

Q. Your duties are at this end, in the City Hall, are they?

60 Mr. PRICE: I object to that slurring remark as unnecessary.

The COURT: Sustain the objection; strike out the question.

Mr. MASON: I think the court ought to admonish counsel for making a slurring remark of that kind.

The COURT: I have stricken it out.

Mr. PRICE: It was not a remark, as I made it. If it was not so, the witness had a chance——

The COURT: It was entirely unnecessary, the latter part of that, Mr. Price. The first part of your question would have been sufficient.

Mr. PRICE: If the court regards it as objectionable, I am willing that it should go out.

Q. Mr. Chadwick, what was the extent of your familiarity with this property in 1894; was your attention especially called to it in connection with that year?

A. Well, I can't say that it was, excepting a general description of that property, of all that property out south lying along the Elevated Railroad. People in the real estate business, doing business on the South side were looking to the future of that property on either side of the Elevated road which had been built only a couple of years prior to that, two or three years.

Q. Where did you live with reference to this property?

A. In 1894, I lived at Pullman at that time.

Q. In the town of Pullman?

A. Yes sir:

Q. Down on Calumet Lake where the works are?

A. Yes sir.

Q. Was your office there at that time?

A. No sir.

Q. Where was your office?

A. Chicago Opera House, Chicago.

61 Q. But your home was at Pullman?

A. Yes.

Q. You went back and forth on the Illinois Central?

Mr. MASON: Objected to as immaterial, his mode of transportation.

Mr. PRICE: I am trying to find out his acquaintance with this property.

The COURT: That is not the purpose, to simply find out the mode of transportation; he may answer the question.

To which ruling of the court counsel for petitioner then and there duly excepted.

A. I traveled principally on the Illinois Central at that time but I also used the Elevated down to Stony Island Avenue and the street car line very frequently.

Q. Do you know how far this property is from the Elevated right of way?

A. I know approximately, yes.

Q. How far?

A. It is about six hundred feet.

Q. What direction?

A. East.

Q. What streets lie between this and the Elevated?

A. There is none.

Q. How far west of this property is the South side Elevated?

A. West of this property?

Q. Yes.

A. I said about six hundred feet.

Q. You say there is no street lies in between it?

A. There is no street between this property.—no North and South street between this property and the Elevated railroad.

Q. Do you know where Calumet Avenue is?

A. Yes sir, I do.

Q. Where is Calumet Avenue?

62 A. Calumet Avenue is on the East side of the Elevated. I will call your attention to the fact that Calumet Avenue

does not run through from Fifty fifth street Boulevard to Fifty-sixth street.

Q. There is no street lies in between?

A. No sir, there is no street between.

Q. But it is about six hundred feet as near as you know?

A. That is approximate. I could take the map here and figure it up in a short time for you. It is in the neighborhood of that; might be a little bit more or a little bit less.

Q. So your knowledge of this property was practically gained by going back and forth on the Elevated road?

A. I didn't say so.

Q. Have you any recollection of actually visiting this property, say in 1894?

A. Yes, indeed, I have stopped at that corner there hundreds of times.

Q. In 1894?

A. Yes sir.

Q. Hundreds of times, practically every day then?

A. If you will remember that 1892, 1893 and 1894 was the great bicycle season; all bicycle riders that used the park streets, one of the headquarters was right on this corner, lot 13, and most every bicyclist can tell you most all about that corner.

Q. Well, now, what has that got to do with your knowledge of it?

Mr. MASON: Sold pop there, I guess.

Mr. PRICE:

Q. Now, Mr. Chadwick, in your opinion that property in 1894 was worth one hundred and twenty dollars a front foot upon the frontage upon South Park avenue?

A. Yes sir.

Q. Does that value, one hundred and twenty dollars a front foot apply to the whole of lots fifteen and sixteen treated as a
63 tract?

A. Yes sir.

Q. Before any of it was condemned or after?

A. I think before and after. I understand what you mean, was that frontage on South Park Avenue with the thirty-seven feet off worth as much as it would be on. I would say not quite, in my opinion very little difference because the valuable frontage of that property is South Park Avenue and always has been.

Q. Well, didn't it have South Park Avenue frontage before the property was taken, just as much as it did afterwards?

A. Well, you could hardly call it that because it fronted on the twenty-nine foot strip, which would be considered nothing more than an alley.

Q. Well, Mr. Chadwick, was it the property opposite or all open property and isn't the value to be derived from a wide street exactly the same as that to be derived from a park in front. It is a question of keeping the property open in front, isn't it which makes frontage values? Don't you find that so in real estate business?

A. Not as you put it at all. One is a proposition of having a street which makes your property thoroughly accessible and the other is giving you what you term frontage in front without any accessibility to your property. They are entir*ley* different.

Q. For what purpose does this property require accessibility more than for residence property. You say it is residence property, do you not?

A. It is.

Q. Wouldn't twenty-nine feet furnish all the accessibility necessary to residence property?

A. No sir.

Q. Why not. What traffic is there going to residence property that can't be easily accommodated in twenty-nine feet.

A. Why, in the first place the appearance would be so against it that it would depreciate the property to a great extent to
64 *being* with.

Q. What has the appearance got to do with its accessibility?

A. Well, if you will wait, I will tell you the balance of it.

Q. I was asking you about accessibility?

Mr. MASON: Let him answer.

A. Now, on the other hand, a twenty-nine foot passageway cannot be improved with a sufficient sidewalk out in front of it so you will have room enough there for accessibility.

Q. How much room does a sidewalk take?

A. The sidewalk as it is there now and the passageway with the parkway takes up fourteen feet, which I think is essential to property of that character.

Q. I am asking you for specific facts, not your opinion of what is necessary; the usual city sidewalk is six feet wide, isn't it?

A. Well, I would not say usual.

Q. Well, don't you know that? Don't you know that the usual city sidewalk on residence property is six feet wide by uniform ordinance throughout the city?

A. No, I would not say that.

Q. I want to know whether it is the fact. I don't care what you say. Isn't that the fact?

A. It depends upon the width of the street to a certain extent. I would say that the majority of city sidewalks are six feet.

Q. Then the usual city sidewalk is six feet?

A. No, I don't put it that way. Most of the sidewalks in the city are six feet.

Q. Well, all right, if you draw a distinction between most and usual, I will let you go at that. As far as appearance goes, Mr. Chadwick, isn't the importance to residence property, the desirability and appearance and all that amply supplied by a park
65 frontage which is and must be kept free of buildings and permanent improvements as well as by a sixty-six foot street upon the opposite side of which permanent improvements may be constructed and thus obstruct the view and the traffic?

A. Not at all,—not at all; absolutely is no comparison between those two situations, so far as the value of real estate is concerned.

Q. What is necessary for the proper improvement of property of this kind, how wide a street ought it to have to meet your idea of what such property requires?

A. A street like South Park avenue which is really a continuation of Grand Boulevard from 35th street down to 67th street which is below the White City where it merges into South Chicago avenue. A street of the character of that should not be less than sixty-six feet.

Q. And your evidence here as to the benefits is based upon the assumption that through this condemnation this property was furnished a sixty-six foot street, is that the fact?

A. Through this condemnation, this property was furnished a sixty-six foot street.

Q. That is your theory on which your testimony of the benefits here is based, is it not?

A. Yes sir.

Q. If it were not furnished a sixty-six foot street, but if it was only furnished a thirty-seven foot street, how much would it have been benefited?

A. If that thirty-seven feet is taken in connection with the present twenty-nine feet on the other side, it would be benefited to the extent of a sixty-six foot street, which is the proposition in this case, as I understand it and it will be benefited to the amount that I have testified to.

Q. It is entirely unimportant then, in your mind, whether
66 the property to make this sixty-six foot street is a part of the street—whether the sixty-six feet is a part of the City street or a part of the park; is that so?

A. No, I would not put it that way. I would put it this way; that if that sixty-six foot street thirty-three or twenty-nine feet of it represented the part dedicated by a public park, I feel that by taking this part of this property this property of this lot, this property receives the benefit of a sixty-six foot street.

Q. Well, Mr. Chadwick, if that twenty-nine foot strip is park property what is there to prevent the Park Board at any time from fencing it up and shutting—or improving it for park purposes and shutting these people off it entirely. Is there anything to prevent that as far as you know?

Mr. MASON: Objected to as speculation.

Mr. PRICE: It is based exactly upon their theory of this case; that that twenty-nine foot strip is not part of the street, but is part of the park and therefore subject to park jurisdiction and may be closed up at any time.

Mr. MASON: Mr. Mecartney's testimony was that it was a twenty-nine foot street; they have tried their case on the theory of a 66 foot street.

Mr. PRICE: I am taking it on your contention. That was Mr. Hart's contention in his opening address to the jury that this was an opening and not a widening. If it was an opening, it is one proposition and if it was a widening it was a different proposition, but the ordinance in this case does provide for opening thirty-seven feet.

Mr. HART: Can't the park dedicate thirty seven feet. They didn't have to dedicate it——

The COURT: What is the question you are asking?

Q. I am asking Mr. Chadwick whether if this thirty-seven feet condemned in this case for all purposes of a public street at South Park Avenue at this point,—whether the benefits he has testi-
67 fied to, the benefits to this property would be the same which he has testified to as derived on the theory of a sixty-six foot street.

Mr. MASON: I object. He has testified to the measure of benefits on a sixty-six foot street and it is useless to go over the ground.

Mr. PRICE: I am asking him whether if it is a thirty-seven foot street his evidence would be the same?

A. Well, now, I don't know that I quite understand you, Mr. Price. If you mean to ask me if the benefits would be the same derived by this property on a sixty-six foot street as it would be on a thirty-seven foot street——

Q. No, you have testified to benefits which you say are based on a sixty-six foot street there. I asked you if it appeared, if it should appear that the thirty-seven foot opening here is the only street that exists at that place, only public highway, would the benefits be the same as on the supposed sixty-six foot street on which you have based your testimony?

A. I would state that it would not appear that way to me, neither from a legal standpoint or from a fact because that roadway has been opened for more than the legal time to make it a street.

Mr. PRICE: I move to strike out the answer as not responsive to the question and ask the court to instruct the witness to answer the question.

Mr. MASON: I submit it was more responsive than counsel thought it would be.

The COURT: I will sustain counsel's motion.

Mr. MASON: He has an old minute clerk on the stand who can follow the vagaries of counsel.

The COURT: Sustain your motion; go ahead.

Mr. PRICE: Answer the question, as the court directed you.

A. If under the supposition that that thirty-seven foot street would be all the usable street they would have there for a street, I concede that the benefit in a thirty-seven foot street would not
68 be as great as that of a sixty-six foot street.

Q. Are you able to state, Mr. Chadwick how much the benefit accruing to the property in question here has been if the opening here is only thirty-seven feet wide?

Mr. MASON: I object to it. There is nothing in the record to support the question on. I object to that question because the whole record supports the theory of a sixty-six foot street.

Mr. HART: Mr. Mecartney testified the twenty-nine feet was a public street.

Mr. PRICE: Mr. Hart has flopped clear around.

The COURT: Don't let us talk about this. We want to get through here to-day.

The COURT: I think the question, in view of the answer of the witness is proper and may be answered; the objection is overruled.

A. Will you read the question.

(Question read).

A. If the opening here is only thirty-seven feet wide, I would say the benefit is what I have testified to.

Q. Did you change your last answer?

A. No sir, I did not change my last answer.

Q. That is, you say that the benefits would be the same as those you testified to on Mr. Mason's question—in answer to Mr. Mason's questions as to what the benefits would be, assuming a sixty-six foot street here, is that what I understand you to say?

A. I did not say that, either. You asked me if I can understand you——

Mr. MASON: Go ahead and try it.

A. You asked me if the opening here was thirty-seven feet if I would testify the benefits were the same. I say, yes I would. That is the proposition here, the opening of thirty-seven feet.

Q. I beg your pardon then, because I understood and think the record will show you said it would not be the same.

The WITNESS: I didn't say anything of the kind.

69 Mr. PRICE:

Q. Your understanding is that it is no material difference whether the street is thirty-seven feet or sixty-six feet wide?

A. I said it was material difference.

Q. Where do you find the difference?

A. The difference is between the width of a thirty-seven foot street and a sixty-six foot street; that is the difference.

Q. What is the difference in benefits between a thirty-seven and sixty-six foot street?

A. That would depend altogether upon the circumstances.

Q. Those are the circumstances; the circumstances are here. I want to know what you think of the benefits.

A. You mean as applied to this property how much?

Q. Yes, as applied to this property, yes,—no dodging now?

A. That is what I would like to know. I would not pretend to say just what the difference in benefit would be.

Q. Would there be any?

A. Would there be any, if this property was limited to a thirty-seven foot street there would be some difference.

Q. How much?

A. I would not say.

Q. You are not able to say then?

A. Not without figuring it out, no sir?

Q. You are not able to say how much benefit would accrue to the property assessed here if this opening is only thirty-seven feet wide.

Mr. MASON: In substance he has gone over that a number of times.

Mr. PRICE: I think I am entitled to an answer from the witness.
The COURT: He may answer?

A. I would not pretend to say without material calculations on a proposition of that kind, because it is ridiculous——

Q. So your evidence is based entirely upon the theory of a sixty-six foot street and you are not able to testify on any other basis, as I understand you?

70 A. I am able to say what I think the property is benefited by the making of a reasonable street here, sixty-six feet wide, which it now has to be.

Q. Now, on the question of proportionate share that this property should bear as compared to the whole cost, if the street is thirty-seven feet and not sixty-six would that be the same as you testified in answer to Mr. Mason's questions as to proportionate share.

A. I know the street is sixty-six feet wide.

Mr. PRICE: I move to strike that out as not responsive to the question.
The COURT: Strike it out.
Mr. PRICE: Read the question, please.
(Question read.)
Mr. MASON: No objection.
Mr. PRICE: I think I am entitled to an answer to that question.
Mr. MASON: Now, just a moment, I submit that on the issue of the proportionate share of the benefits, under the ratio of all the assessments to the individual assessment, the question of whether the street is thirty-seven feet or sixty-six feet is not material.
The COURT: I think it has been made material.
Mr. MASON: On the issue of benefits, but not on the issue of the proportionate share.
The COURT: On the cross-examination of this witness.
Mr. MASON: I beg pardon?
The COURT: I say I think it has been made material on the cross examination of this witness.
Mr. MASON: Very well; I urge my objection.
The COURT: Objection overruled.
To which ruling of the court, counsel for petitioner then and there duly excepted.
Mr. PRICE: Answer the question. I ask that the witness answer the question.
The COURT: If you don't understand the question, have it read.
(Question read.)

71 A. I don't think that would make any difference on proportionate share.

Mr. PRICE:

Q. The proportionate share this property would bear would be the same in your opinion?
A. Yes sir.
Q. Whether there was a thirty-seven or sixty-six foot street?
A. Yes sir.
Q. That is it should bear what it is assessed, practically forty per

cent of the whole opening, not only in front of it but for the whole property taken, that is your idea of the case?

A. I think so.

Q. I want to understand you is all?

A. Yes sir.

Q. I understand from your evidence, Mr. Chadwick the property remaining which has been since subdivided into Edgar M. Snow & Company's subdivision after the thirty-seven feet was taken by the city is worth one hundred and twenty dollars a foot; is that your testimony?

A. I say after this improvement, after the benefit of this improvement has accrued to this property, that this property would be worth $150.00 a front foot.

Q. $150.00 a front foot, but before any condemnation takes place at all here, the whole thing was worth one hundred and twenty dollars a front foot, do I understand you that?

A. The part of the property that remains there now, yes.

Q. The part of the property that remains there now is worth $150.00, was worth $150.00 after condemnation?

Mr. MASON: He did not so testify.

A. I did not so testify.

Mr. PRICE: I didn't get it then. You say before any part of this property was taken, you say the South Park Avenue frontage was worth $120.00 a foot, is that your testimony?

72 A. The street that is there now was worth $120.00 a foot and fronting on South Park avenue. After it received the benefit of this assessment, it was worth $150.00 a front foot.

Q. There is this difficulty, Mr. Chadwick, that the property that is there now wasn't fronting on South Park avenue before the condemnation—was it?

A. It was there wasn't it?

Q. You mean without any South Park Avenue frontage it was worth one hundred and twenty dollars a front foot; is that it? I want to get you straight on this. I am not trying to mislead you.

A. No, it was not without any frontage at all, it would not be worth one hundred and twenty dollars a front foot. If you will eliminate from your mind a minute and see that thirty-seven feet is taken there and then from the benefit accrued and you have got a frontage there of the present price, that was worth $120.00 a foot before this benefit accrued. After this benefit accrued, it was worth $150.00 in my opinion.

Q. Well, then, how much was the whole tract worth before any condemnation, Mr. Chadwick per front foot fronting East?

A. The whole tract was worth a very little bit more.

Q. More than what?

A. More than one hundred and twenty dollars a front foot for the part that is there now.

Q. By virtue of the condemnation, thirty dollars per front foot was added to the total value of the whole tract?

A. No, not to the total value of the whole tract because there was a certain value that the thirty-seven feet there had. There is no question about that.

Q. You testified that with the thirty-seven feet on the tract was worth one hundred and twenty dollars a front foot or a little more than that, you said; you did not indicate how much,—fronting east?

A. It was worth more than that.

Q. How much more?

73 A. I don't think it was worth as much more as the award, which was $7,400.00. I don't think it was worth that much more with that piece on there. For this reason, the valuable part of that property is the South Park frontage and you never could make it anything else and it is just as accessible for building purposes with that thirty-seven feet off as it was with the thirty-seven feet on. In other words, it has been now adapted to the only suitable thing that that property is good for. It has been adapted to that use now and the loss of that thirty-seven feet has not materially depreciated the value of the entire piece.

Q. Deteriorated the value?

A. No, it has not materially decreased the value on account of the valuable frontage being on South Park Avenue.

Q. You think it has probably decreased the value some, do you?

Mr. MASON: I object.

Mr. PRICE:

Q. You say it has not materially, but you think it has diminished it some?

Mr. MASON: I object to going into any of the issues of the condemnation suit again in this case, trying over again here the condemnation issues of damages to remainder.

Mr. PRICE: Mr. Mason seems to be very ticklish about getting into that condemnation case.

Mr. MASON: I don't think we ought to have it dragged into this case when it is a closed question.

Mr. PRICE: The only question suggested by the condemnation——

The COURT: When you have any objections to make, make them to the court, each of the counsel. I think it is very unsatisfactory practice to have lawyers discussing over the table what should and should not be done. I will try to protect you, if you think I don't, save your record.

Mr. PRICE: If I have offended the Court, I beg the Court's pardon, the provocation has been not unjustifiable.

The COURT: I want it stopped from now on.

Mr. PRICE: That is all.

74 Redirect examination.

By Mr. MASON:

Q. Mr. Chadwick, you have measured the benefits and proportionate share have you not, on a sixty-six foot basis?

A. I have.

Mr. MASON: That is all.

Mr. PRICE: That is all.

The COURT: Call your next.

ARTHUR W. DRAPER called as a witness on behalf of Petitioner in rebuttal testified as follows:

Direct examination.

By Mr. MASON:

Q. What is your name?
A. Arthur W. Draper.
Q. What is your business?
A. Real estate business.
Q. What is the firm name?
A. Darper & Kramer.
Q. What Kraper is that?
A. Adolf F.
Q. Where is your office?
A. We have an office at 115 Dearborn street and also one at 47th and Calument Avenue.
Q. How far is 47th and Calumet Avenue from the property in question?
A. About a mile North, a little over a mile.
Q. How long have you been in the real estate business?
A. Twenty-two or twenty-three years.
75 Q. How long has this firm been in existence?
A. Since November 1, 1893.
Q. What property have you handled in the down town district or any district of the city of Chicago; state briefly your experience?
A. We have handled a number of properties, both vacant and improved, from 40th street to 63rd Street from 1892 or 1893 to the present time, several properties.
Q. Any down town stuff?
A. And some property down town.
Q. What?
A. Some property down on State street North of 12th; a piece of property on Milwaukee Avenue just this side of Halsted,—the other side and a piece of property on Jackson Boulevard there near Franklin; more especially properties,—paid more attention to property from 40th street to 63rd Street and streets particularly on the South side.
Q. Make a specialty of that part of the city, do you?
A. Yes sir.
Q. Have you sold any property in that locality?
A. Yes sir.
Q. Have you sold any property in the locality of these improvements?
A. Yes sir.
Q. How much have you done in this particular locality.
—. Well, since the later part of,—I think it was 1892, or the early part of 1893.
Q. Have you ever handled any of this particular Snow & Company's subdivisions?
A. Yes sir.
Q. You have?

A. Yes sir.
Q. Did you know this property in 1894?
A. In a general way, yes sir.
76 Q. And prior to that?
A. Yes, in a general way.
Q. Now, you know this improvement, do you not?
A. Yes sir.
Q. You know the extent of it?
A. Yes sir.
Q. What were lots fifteen and sixteen worth in 1894 before the opening, a front foot on South Park Avenue?
A. Well, I did not figure it that way.
Q. Well, how did you figure the value, of what frontage?
A. I figured it on Fifty-sixth and Fifty-fifth Place frontage.
Q. All right; what was its value on 56th Street before the opening?
A. One hundred and twenty five dollars a foot for 56th street and seventy-five dollars for 55th Place.
Q. Why do you make a difference in value between those two streets?
A. Well, 56th Street was a through street extending east and west for quite a distance and 55th Place or Ross, was a short street, and was unpaved and had practically no improvements.
Q. How far west did 56th street extend in those days?
A. It was paved, if I remember rightly, between South Park and State Street and extended west to State Street.
Q. Was South Park Avenue open the full width of sixty-six feet in 1894 between, we will say 58th and 54th or was there an obstruction in the street?
A. Well, prior to the latter part of 1893 there was an apparent obstruction.
Q. Well, it is already in the record; I won't go into it any more. Your valuation for the 56th street front was $125.00 a front foot?
A. Yes.
Q. 55th Place was $75.00 a front foot?
A. Yes.
77 Q. What was the whole piece worth before the opening?
A. Forty thousand dollars.
Q. What was that whole tract worth after the opening.
Mr. PRICE: You mean the tract without the thirty-seven feet?
A. $32,600.00.

Mr. MASON:

Q. You have got that just turned around, haven't you?
A. Yes, I beg your pardon.
Q. All right, give it to us?
A. The proportionate part,—I figured 163 feet as a part of the 200 feet; I considered that the property was worth, the 163 feet was worth $150.00 a front foot for 270 feet and eight inches or 270 feet of frontage on South Park Avenue.

Q. Worth $150.00?
A. Yes.
Q. Was that before or after the opening?
A. After the opening.
Q. What was it worth before the opening?
A. $32,600.
Q. How much was that a front foot?
A. That is 163 feet by 270.

Mr. PRICE: I think there ought to be some limit to which a witness without any explanation will testify.
The COURT: He said he wanted to correct it.

Mr. MASON: He has a right to correct any obvious mistake; go ahead with your answer.
A. I did not get the question.
Q. Let me ask you this question, Mr. Draper, did the opening in this case in your judgment increase the value of this property?

Mr. PRICE: Objected to as leading.
Mr. MASON: All right, I will withdraw it.

Q. What effect upon the value of this property did the opening in question have?
78 A. It benefited it?
Q. How much?
A. Thirty dollars a foot for the South Park avenue frontage.
Q. Thirty dollars a foot for the South Park avenue frontage. What was the South Park avenue frontage worth per front foot after the opening?
A. One hundred and fifty dollars.
Q. What was it worth before the opening?
A. That is the amount I allowed there, the 163 feet on South Park avenue frontage I considered worth $120.00 a foot before the opening, 163x270.
Q. In other words, Mr. Draper, the remainder of lots fifteen and sixteen, the part not taken which is 163x270?
A. Yes sir.
Q. Was worth $120.00 a front foot before the opening and the same remainder was worth $150.00 after the opening?
A. Yes sir.
Q. That is right, is it?
A. Yes sir.
Q. That is the way you want to be understood?
A. Yes sir.
Q. How much benefit, what was the total benefit to that remainder by this opening?
A. $8,100.
Q. $8,100.00?
A. Yes sir.
Q. In your judgment does $8,100 the benefit exceed the proper proportionate share of benefits that ought to be assessed against that remainder?
A. No sir.

Q. Why not; why do you fix the proportionate share of benefits of the property at $8,100.00.

79 A. The property receiving the benefit of the street being opened up from 55th to 56th get- greater access and greater accessibility than it had before and on the market was considered as a more desirable piece of property?

Q. Why?

A. Because it was a piece of property that would attract purchasers.

Q. Why would it attrac*h* purchasers?

A. Because it is more capable of suitable improvement and improvement such as it now has.

Q. Capable of better improvement?

A. Yes sir.

Q. And those better improvements were in fact made were they, later?

A. Yes sir.

Q. In what way did opening up this property to the Boulevard on the North affect its value?

A. It gave it greater accessibility and enabled the owner to change the frontage to its most desirable frontage.

Q. What is its most desirable frontage?

A. Facing East on South Park avenue.

Q. According to that Snow & Company's subdivision plat?

A. Yes.

Q. You have measured your benefits and your proportionate share upon a sixty-six foot street, have you not?

A. Yes.

Mr. MASON: That is all.

Cross-examination.

By Mr. PRICE:

Q. Mr. Draper, how long do you say you have been in the real estate business?

80 A. Since about 1887 or 1888.

Q. Where were you operating in the year 1894.

A. Down in this territory.

Q. Was your attention at that time particularly called to this property?

A. Not especially, only in a general way that we were operating in this particular territory. We, of course have operated in that territory along the Elevated from 40th Street to 61st Street commencing the early part of 1893; from that time on.

Q. Do you have any personal recollection; individual recollection of the conditions and circumstances as they then existed, in this property in 1894.

A. Only in a general way from my memory as to that class of territory and what was in that class of territory at that time.

Q. That is, you are basing your estimate on your general knowledge and not on particular knowledge of this particular property at that time?

A. Yes, I knew this particular property at that time.

Q. How did your attention happen to be called to that particular property at that time?

A. Because we started to make inquiries concerning the ownership along this territory and as to the prices on all this property. I don't remember that I made any special inquiry as to this, but I was going up and down these streets getting posted as to locations and noted the maps of the various property and what the physical conditions were in this particular district.

Q. You have an opinion, have you not, as to the front foot value of lots fifteen and sixteen prior to the condemnation in 1894?

A. Yes sir.

Q. And you testified here in answer to Mr. Mason's question that taking those lots fifteen and sixteen the frontage on 56th Street was worth $125.00 a front foot and that the North front was
81 worth $75.00 a front foot, that is your idea of value at that time?

A. That is for the entire piece.

Q. For the entire piece?

A. Yes sir

Q. And the frontage on 56th Street was how many feet?

A. Two hundred feet.

Q. And the frontage on 55th Place was the same amount was it not?

A. Yes sir.

Q. Making two hundred feet on each street?

A. Yes sir.

Q. So that taking the frontage and multiplying it by the rate per front foot as testified to makes the value of this property prior to this condemnation $40,000.00; that is right, is it not?

A. Approximately, yes sir.

Q And you testified, did you not, that the tract out of which Snow & Company's subdivision was made being the whole lots less the east thirty-seven feet prior to the opening was worth $120.00 a front foot upon the South Park Avenue frontage, as a basis?

A. I didn't quite catch that. I don't think so.

Q. You testified, did you not,—I call your attention that the property was 163 x 270 feet, which is the property now included in Snow & Company's subdivision before the opening was worth $120.00 a front foot being the South Park Avenue frontage as the basis?

A. Yes sir.

Q. That is, it was worth $32,400.00?

A. Before the opening?

Q. Yes.

A. Yes sir.

82 Q. That is your idea, is it?

A. Yes sir, that is a part of the whole tract.

Q. And that by the opening of this 37 feet, $30.00 per front foot was added to that two hundred and seventy feet?

A. Yes sir.

Q. Making the property that was left worth more than the whole tract was worth in the first instance?

Mr. MASON: I don't think he gave any such figures, your Honor. He took the inside 163 feet to start with; he did not take the total 209.

The COURT: That is for him to say.

Mr. PRICE: I object to Mr. Mason's interruption. I think the witness can correct me, if I don't quote the witness correctly.

The COURT: Get the question before you in your mind and then answer counsel.

Q. At the $30.00 per front foot adds $8,100.00 to the value of the property, does it not, Mr. Draper?

A. Practically, yes sir.

Q. And you had $32,400.00 as your value before so it makes your idea that the property after the taking was worth $40,500.00 as against $40,000. before the taking; that is the remainder is worth more than the whole?

A. Yes, I think the remainder is worth more than the whole.

Q. That is your idea. Mr. Draper, did you ever make any special assessment rolls?

A. No sir.

Q. Ever testify in special assessment cases?

A. Yes sir.

Q. To what extent?

A. Not to a very large extent.

Q. How does it come, Mr. Draper or do you care to explain it, how, you and Mr. Mueller and Mr. Chadwick all arrive at exactly the same figure for benefits here, $8,100.00. Did you have
83 any prior consultation about this?

A. No sir.

Q. No consultation with one another whatever in regard to this?

A. Any special consultation?

Q. Any talk about what your testimony would be in this case?

A. No, nothing especial except that we had some conversation as to the probable value of propert-.

Q. Discussed what your testimony would be in the case?

A. What our evidence would be in the case?

Q. Yes.

A. No, we had some discussion as to ideas of value; that is customary, that sometimes happens.

Q. Did you discuss them with Mr. Mason or Mr. Hart?

A. No, I don't know as I ever did.

Q. You did not with either one of them?

A. No, Mr. Mason never asked if I have any ideas of values.

Q. Do you know how much the property in Snow's subdivision is assessed in this case, Mr. Witness, do you know how much lot 1 in Snow & Company's subdivision is assessed in this case?

A. I understand so, yes, approximately.

Q. How much? I don't ask you to tell me from memory if you know?

A. I could not tell from memory, without looking at it but somewhere a little less than $30.00 a foot.

Q. You think it was under assessed then?

A. Oh, yes sir, I think the value was,—the benefit was greater than the assessment.

Q. And that is true of all the lots in your opinion?

A. Yes sir.

Q. Your opinion of values here, you say is based entirely upon the theory that there has been provided for this property a sixty-six foot wide public highway East of it, irrespective of any park lands or park control; is that the idea?

84 A. Yes practically or apparently the park has control or there would be side-wa-k space on the east side of that street.

Q. So apparently it is not a sixty-six foot street then?

A. Apparently it is but they seem to have control of a part of the space there because there only seemed to be used by the public outside of the park-way space fifty-two or fifty-three feet.

Q. No side-walk on the East side of the street, is there?

A. No.

Q. Very little more than thirty-seven feet used there now, is there?

A. Approximately fifty-two or fifty-three feet.

Q. Apparently the rest of it is under park control as part of the park property?

A. Yes.

Q. Your testimony is based upon full sixty -ix feet?

A. It is based upon the theory that they are getting the benefit of a full sixty-six foot street; I don't know to whom——

Q. Do you know of a-y way by which they can get the benefit of a street if it is not there?

A. I don't know to whom that property belong, because on the North side of 51st Street, the park takes charge of the side-walk and also the space between the side-walk and the road-way. Now whether—if it is common information that that is a part of 51st Street, the same condition might exist here on South Park Avenue.

Q. You don't know whether it exists or not?

A. Without the——

Q. There is no side-walk?

A. There is no side-walk on the East side of South-Park avenue, then it may be City property or a part of a street.

Q. You don't know whether it is or not?

A. My own knowledge?

Q. Yes.

85 A. I don't know any more than what I can see there.

Q. Mr. Draper, if the opening provided by this ordinance, which is thirty-seven feet wide, is the only public street which the owners have any right to demand and keep open as a public street East of this property, what in your judgment would the benefit be derived from this opening?

A. It would be the same as if it was on a sixty-six foot street.

Q. That is, in your judgment, a thirty-seven foot street is a- profitable to this property and this locality as a sixty-six foot street would be?

A. Yes, sir; because they have got all the advantage they ever have. They only need half a street at this point for roadway or side-walk properly, through the park evidently have a wider roadway.

Q. That is if you have enough room to get access?

A. Yes.

Q. — open park land beyond it is just as useful to property as a full width street, in your opinion?

A. I didn't quite catch that.

Q. That is, if you have enough road way to make reasonable access to the property, to have the open space beyond provided by a public park it is just as useful to the property as if you had an ordinary width street, is it not?

A. No, not as useful.

Q. You say twenty-seven feet would not be as useful there as sixty-six feet?

A. I didn't say as useful.

Q. You say the benefits would be the same?

A. I say the benefits might be just the same.

Q. Would it be just the same in your opinion?

A. The benefit, if it is thirty-seven feet wide?

Q. Yes.

A. And the roadway was narrowed down, the benefit may
86 not be quite so great as if the roadway was widened and the side-walk space was narrowed down or vice versa; depends entirely on the traffic in there.

Q. Well, the traffic needed there by this property are general public traffic.

A. The general public traffic and the traffic needed by this property to get at the necessary amount of accessibility.

Q. But you think the difference between thirty-seven feet and sixty-six feet in so small that you would not attempt to discriminate between the two as to value of the property?

A. I don't think it would have any material difference as to whether it was a thirty-seven foot street whether the city has a thirty-seven foot street and the parkway, they get the twenty-nine feet just——

Q. You think there would be some difference, do you?

A. Or whether the parkway use that for other purposes.

Q. You think there would be some difference, to you?

A. I don't think there would be any material difference.

Q. Could you estimate the difference in dollars and cents?

A. No, sir.

Q. You could not. Now Mr. Draper how much difference would there be in the usefulness of property between a thirty-seven foot street lying between that property and the park lands and a twenty-

nine foot street lying between that property and park lands; would there be any difference?

A. Yes, there would be proportionately more as a matter of fact for a thirty-seven foot street because twenty-nine feet is impracticable on the proposition of that class of a street facing the park.

Q. Twenty-nine feet is eight feet less than thirty-seven?

A. Yes. That was what I meant.

Q. Thirty-seven is less than sixty-six, 29?

A. Yes.

Q. Still you think taking off eight feet would be a more material depreciation than taking twenty-nine feet?

87 A. Yes, the same proposition.

Q. Where do you draw the lines?

A. The same proposition to take 1/16 inch off your nose and taking one-quarter inch.

Q. Where do you draw the limits as to amount which you can take off your nose without being injured?

Mr. MASON: I object; this isn't a clinic.

The COURT: Objection sustained. We haven't time for that nice reasoning.

Mr. MASON: It depends upon his nose.

The COURT: Is that all, Mr. Price?

Mr. PRICE:

Q. You have no other explanation, have you of your evidence than that mere difference in width, that thirty-seven feet in your idea is as practicable, sufficiently wide street to lie between the property and a park, but twenty-nine feet is an impossible street and would be impracticable and not useful?

A. You can have eight feet for your side-walk off 37 feet and if you had 29 feet and would take your eight feet off your 29 feet and leaves you 21 feet and you have an impracticable roadway.

Q. Suppose you make a six foot side-walk that is what they are in this neighborhood aren't they?

A. I am taking the difference in your feet; that would leave 23 feet.

Q. Take twenty-nine feet and take six feet off for side-walk and you have twenty-three feet roadway, haven't you?

A. Yes, sir.

Q. Aren't many roadways built now about Chicago here not over twenty-three feet wide and the tendency is to make them narrower all the time and the best authorities say roadways have been made to- wide and they are now making them narrower.

Mr. MASON: Objected to as immaterial.

The COURT: Sustain the objection.

Q. Isn't twenty-three feet, Mr. Draper, a usable and prac-

88 ticable roadway for vehicles?

A. No, I don't consider it so.

Q. Did you ever see a roadway twenty-two feet wide?

Mr. MASON: Objected to as immaterial.

The COURT: Sustained as to whether he ever saw one or not.

Mr. PRICE:

Q. Mr. Mason, suppose that twenty-nine feet which you say apparently is now a part of the park suppose the park authorities should exercise the right that they have and fence it up as a part of the park?

Mr. MASON: I object.

Mr. PRICE: What would be the effect upon the value of this property.

Mr. MASON: I object; your question assumes that twenty-nine feet is park lan-, whereas his own witness swore it was a public street.

Mr. PRICE: I beg your pardon.

Mr. MASON: Mr. Mecartney swore it.

Mr. PRICE: I am taking the statement as made to the jury in Mr. Hart's opening in this case.

Mr. HART: My opening statement wasn't evidence and Mr. Mecartney swore it was a city street twenty-nine feet.

The COURT: The objection is sustained.

Mr. PRICE: He swore it was being used for street *pur-* purposes.

Mr. MASON: Objection sustained, your Honor?

The COURT: Yes.

To which ruling of the court, counsel for objectors then and there duly excepted.

Mr. PRICE:

Q. Is your evidence as to the value of a thirty-seven foot street here based upon the assumption that park lands adjoining it would be kept open.

Mr. MASON: Objected to on the same ground.

Mr. PRICE:

Q. To give the effect of a full width street.

Mr. MASON: It assumes the strip is necessarily park land and the record don't support the assumption.

The COURT: I didn't understand this witness to testify in
89 this case as to the value of a thirty-seven foot street; that is your question?

Mr. PRICE: The court is mistaken on that because the witness did testify I think the record will show that if it was the result would be the same as the thirty-seven and the sixty-six feet.

The COURT: He testified about the value of property, that is of the thirty-seven feet but not as to the value of a thirty-seven foot street. Ask your question plain and then he can answer it.

Mr. PRICE: Very well.

The COURT: Put your question over again.

Mr. PRICE:

Q. Mr. Draper, is your evidence that a street thirty-seven feet wide at this point would be as useful and add as much to the value of the property assessed in this case and objected for, as a full width,

sixty-six foot street would add, based upon the assumption that the property to the East of this thirty-seven feet condemned in this case is park lands and will be kept open?

Mr. MASON: I object to that; he has not testified that way.

The COURT: He is asking him now, if he does base his estimate on that alone. He may answer.

To which ruling of the court, counsel for petitioner than and there duly excepted.

A. No, I base my estimate that there is a sixty-six foot street there.

Mr. PRICE: I move the answer be stricken out.

The COURT: That is responsive that it is based upon the proposition of a sixty-six foot street.

Mr. MASON: That is what he is trying to get at, whether he had in mind a thirty-seven foot street or a sixty-six foot street, and he has answered it.

The COURT: Yes.

Mr. PRICE: Then you don't wish to testify at all, do you—do you want to be understood as testifying at all as to what benefits would accrue or have accrued to this property by reason that the opening here is only thirty-seven feet; is that the point?

90 A. Well, physical conditions show there is a street there wider than thirty-seven feet.

Q. Answer my question, please. Your evidence is all in this case upon the assumption that there is a street sixty-six feet wide to the East of this property?

A. Yes, sir.

Mr. PRICE: That is all.

Redirect examination.

By Mr. MASON:

Q. You gave me on your direct examination $120.00 a front foot before the o-ening and $150.00 a front foot after the opening of South Park avenue?

A. Yes, sir.

Q. And as I understood you at the time, the piece of ground that you had in mind in giving this value before and after was 163 x 270, was it not?

A. Yes sir.

Mr. MASON: That is all.

* * * * * * *

91 And afterwards, to-wit, on the Twenty-first day of October A. D. 1910, the same being one of the days of the term of Court aforesaid certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

7387.

CITY OF CHICAGO, Appellee,
vs.
FRANK J. WILLOUGHBY et al., Appellants.

Appeal Circuit Court Cook.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that Appellant, hath filed her-in a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by George A. Mason and Edgar H. Hart for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

92 UNITED STATES OF AMERICA,
*State of Illinois, ss:*

At a term of the Supreme Court, Begun and held at Springfield on Tuesday, the Seventh day of February, in the year of our Lord One Thousand Nine Hundred and Eleven, within and for the State of Illinois.

Present:

The Honorable Alonzo K. Vickers, Chief Justice.
Honorable James H. Cartright, Justice.
Honorable William M. Farmer, Justice.
Honorable Frank K. Dunn, Justice.
Honorable John P. Hand, Justice.
Honorable Orrin N. Carter, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, that afterward to-wit, on the 25th day of February, 1911, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 7387.

CITY OF CHICAGO, Appellee,
v.
FRANK J. WILLOUGHBY et al., Appellants.

Appeal from Circuit Court Cook.

Docket No. 7387—Agenda 101—October, 1910.

93 CITY OF CHICAGO, Appellee,
v.
FRANK J. WILLOUGHBY et al., Appellants.

Mr. Justice FARMER delivered the opinion of the court:

Appellants are the owners of or interested in property against which a special assessment for local improvements has been confirmed by the judgment of the circuit court of Cook county. To reverse that judgment this appeal is prosecuted.

The property in controversy is situated on South Park avenue between Fifty-fifth and Fifty-sixth streets. South Park avenue originally was sixty-six feet wide except between those two streets, where it was only twenty-nine feet wide. It was proposed by the city to widen South Park avenue between the streets mentioned, by the condemnation of thirty-seven feet off the east side of the property of appellants and others abutting on said South Park avenue, and an ordinance providing for the condemnation of the property was passed by the city council on the 24th of July, 1893. The proceeding was under section 53 of article 9 of the Cities and Villages act of 1872, as amended and then in force. Said section, in part, was as follows:

"SEC. 53. Whenever any city or village shall apply to any court for the purpose of making just compensation for property taken or damaged by such proceedings as are authorized by this act, such city or village may file in the same proceedings a supplemental petition, praying the court to cause that an assessment be made for the purpose of raising the amount necessary to pay the compensation and damages which may be or shall have been awarded for the property taken or damaged, with the costs of the proceeding. The said court shall have power, at any time after such supplemental petition shall have been filed, to appoint three commissioners to make such assessment, and to ascertain, as near as may be, the costs incurred to the time of such appointment, and the probable further costs of the proceedings, including therein the estimated costs of making and collecting such assessment, and shall direct such costs to be included by such commissioners in making said assessment. Like proceedings in making said assessment shall be had, and the assessment shall be made, collected and enforced in the same manner, as near as may be, as is provided in this article in other cases. * * * And every such cause shall be considered as pending in

the court in which the same has been, or shall be commenced, until all the lands sought to be taken are paid for, or until the proceedings are dismissed where the lands have not been taken."

94 The ordinance provided that the cost of widening the street should be paid for by special assessment against the property benefited to the amount that it could be legally assessed for that purpose and that the remainder of the cost should be paid by general taxation. By consent of the owners of the property the appellee took possession of it and widened and paved the street before compensation was assessed for the property taken: Afterwards condemnation proceedings were instituted and the compensation of the property owners for land taken was assessed and judgment entered thereon. December 4, 1894, appellee filed a supplemental petition for the spreading of a special assessment to pay the amount of the awards made to the property owners. This petition was dismissed and another filed December 28, 1895. This was dismissed also, and a third supplemental petition was filed February 20, 1897. An assessment roll was filed July 14, 1897, assessing the property of appellants $9015. Objections were filed to the confirmation of the assessment. A jury trial was had and a verdict returned finding the issues for the petitioner as to all the property except lots 1 to 8, inclusive, which is the property here involved but originally described as lots 15 and 16, block 2, Yerby's subdivision, etc. The lots were later subdivided into lots 1 to 8, inclusive, of Edgar M. Snow & Co.'s subdivision of lots 15 and 16, block 2, Yerby's subdivision, etc. By the verdict of the jury the assessment against these lots was reduced to $6770. A new trial was granted the owners of said lots 1 to 8, and a judgment of confirmation was rendered against all the other property for the amount assessed against it in the assessment roll. June 22, 1901, a hearing was had upon the objections of appellants before the court without a jury. The objections were sustained and the petition dismissed as to lots 1 to 8, inclusive. The judgment recites that "in the original condemnation proceedings in this case the benefits to the property in question hereinabove mentioned were, under the issues there presented, involved, considered and determined, and having been litigated in that

95 case cannot again be the subject of litigation and the city is estopped by the former verdict and judgment, and the court, for the reasons aforesaid, finds the issues for the said objector." A writ of error was sued out of this court by appellee and the judgment of the circuit court was reversed. (City of Chicago vs. Mecartney, 216 Ill. 377). It was there held that the judgment in the condemnation proceeding was not conclusive against a subsequent proceeding to assess the property for benefits. No remanding order was filed in the lower court within two years, and no further steps were taken by appellee to assess appellants' property for the improvement until January 24, 1910, when the city council passed an ordinance for a new assessment. Said ordinance recited that the previous proceeding for the assessment of the property was annulled, and the corporation counsel was directed to have the said assessment set aside and a new assessment made and returned for the purpose

of raising the amount necessary to pay the compensation and damages which had been awarded for property taken for said improvement, together with the cost of said proceeding. The property against which the original assessment had been confirmed, except one parcel, was re-assessed the same amount that had been confirmed against it under the original assessment but it was entered in the assessment roll that the same had been paid. This, it was claimed, was necessary in order that the proportionate share of the assessment against the appellants' property would be made to appear. There was no judgment of confirmation on the new assessment against any property but the appellants'. Appellants' lots were assessed in the new assessment roll $7783.60. The total assessment, including that which had already been paid, amounted to $20,373.88. The assessment paid by all property owners other than appellants amounted to $10,158.74, leaving a balance required to pay the compensation awarded property owners for land taken, including costs and interest, of $10,215.14.

The principal argument of appellants is devoted to the first
96 proposition in their brief, which is: "Where an assessment is confirmed, the court having jurisdiction, and the term has expired, there is no power, either in the court or the city council, to annul or set aside such assessment except for fraud or by consent of both parties." In support of this contention McChesney vs. City of Chicago, 161 Ill. 110, People vs. McWethy, 165 Id. 222, Le Moyne vs. City of Chicago, 175 Id. 356, Rich vs. City of Chicago, 187 Id. 396, Doremus vs. City of Chicago, 212 Id. 513, and other cases are cited. In those cases it was decided that neither the city council nor the court in which the special assessment proceeding was had, has power to set aside a judgment of confirmation at a term subsequent to the term at which the judgment was rendered. In the case here under consideration the assessment roll was confirmed as to all the property assessed except the property of appellants. As to their property objections to the assessment were sustained and judgment of confirmation denied on the grounds recited in the order above referred to. This court held this property was liable to assessment for benefits and reversed the judgment and remanded the case. The remanding order never having been filed in the court below there never was any judgment of confirmation against appellant's property prior to the judgment appealed from in this case.

If the authority of the city to assess appellant's property under the second supplemental petition depended upon section 48 of the act of 1872, which is substantially the same as section 60 of the present Local Improvement act, the assessment could not be sustained. That section applies only in cases where there has been a judgment of confirmation, and authorizes a new assessment against property within five years after confirmation of the original assessment, where, from any cause, the city fails to collect an assessment levied, which has not been cancelled or set aside by order of any court. As this is not a supplemental assessment, section 47 of the act of 1872, which forms a part of section 59 of the present
97 act, does not apply, for that section relates to supplemental assessments where the first assessment proves insufficient.

Section 46 of the act of 1872, which is identical with section 57 of the present act, is as follows:

"SEC. 46. If any assessment shall be annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made and returned, and like notice given and proceedings had, as herein required in relation to the first; and all parties in interest shall have like rights, and the city council or board of trustees, and the court, shall perform like duties and have like power in relation to any subsequent assessment as are hereby given in relation to the first assessment."

The assessment roll under the first supplemental petition, as we have said, was never at any time confirmed against appellant's property. The city, it is true, could, by filing the remanding order of this court, have proceeded to assess the property benefits in that proceeding. By failing to file the remanding order, did it lose the right at any time thereafter to assess the property its proportionate share of benefits, if any accrued to it by reason of the improvement?

Appellee relies upon sections 46 and 53 as authorizing the assessment and the method pursued in causing it to be made and confirmed. It would seem clear that the case is not one for the application of the five years' limitation prescribed by section 48. The failure of appellee to file the remanding order of this court in the court below was an abandonment of that particular suit or proceeding against the appellants' property but was not an abandonment of the right to levy an assessment against it for the purpose of paying the awards made in the condemnation suits. The judgments in the condemnation suits were never appealed from but remain in
98 full force and effect, and the particular suit or proceeding for the first assessment was ancillary to the condemnation proceeding. (Philadelphia & Reading Coal & Iron Co. vs. City of Chicago, 158 Ill. 9). No proceeding could be had against appellants' property under the first supplemental petition, and the assessment made thereunder, after the failure to file the remanding order of this court within the time required by statute, but the city was not without authority, under sections 46 and 53, to cause a new assessment of it to be made.

In Philadelphia & Reading Coal & Iron Co. vs. City of Chicago, supra, an assessment was made in 1887 to pay the compensation awarded property owners in condemnation suits for opening and extending a street. The ordinance for opening the street and condemning the property was passed in March 1886. The assessment roll returned under the supplemental petition to make an assessment to pay the awards in the condemnation suits was confirmed. Certain objectors appealed from the judgment of confirmation to this court, and the judgment was reversed on the ground that the ordinance and plan of the proposed improvement provided for the extension of the street across the Chicago river but contained no provision for the construction of a bridge for crossing the river. (Hutt vs. City of Chicago, 132 Ill. 352). No remanding order was filed within two years. The city constructed a bridge which was paid for by general taxation, and after its completion the council annulled the

old assessment and ordered a new assessment made to raise the amount awarded property owners in the previous condemnation suits. A supplemental petition was filed and a new assessment roll returned. The Philadelphia & Reading Coal & Iron Co. and the Lehigh Valley Coal Co. objected to the assessment against their property but their objections were overruled and the assessment roll confirmed, whereupon they appealed from the judgment of confirmation to this court. The property owned by the Philadelphia & Reading Coal & Iron Co. had been assessed in the first proceeding $2500, which was paid by the then owners. Subsequently the Philadelphia & Reading Coal & Iron Co. became the owners
99 of it. The Lehigh Valley Coal Co. was one of the appellants in Hutt vs. City of Chicago, supra, and it had paid nothing under the old assessment. That company raised the question that by reason of the reversal of the judgment of confirmation in 1889 and the failure to file the remanding order the city was barred from making a new or other assessment without starting anew by adopting new ordinances authorizing condemnation of property and the payment for it by special assessment. This contention was not sustained and the judgment confirming the assessment roll against the company's property was affirmed. Under the old assessment roll the property of the Philadelphia & Reading Coal & Iron Co. was assessed $2500. Under the new roll it was assessed $3150, and that company raised the question that the previous assessment having been paid by the then owners of the land, it was a bar to a new assessment and the land discharged from any further burden unless proper steps were taken to collect a deficiency. The assessment was sustained, the court holding that the $2500 paid under the former assessment should be credited on the new assessment roll and the company was required to pay the difference, $650. The court held section 46 authorized making the assessment.

In the Hutt case the ordinance was held invalid, and this was, in effect, a setting aside of the assessment and rendered the judgment of confirmation void, (Murray vs. City of Chicago, 175 Ill. 340) and all the property previously assessed was again assessed in the new assessment roll, and this was sustained by this court. In City of Chicago vs. Mecartney, supra, the assessment was not held invalid, and the judgment of confirmation as to all property against which the assessment roll was confirmed and from which no appeal was prosecuted was a valid and binding judgment, not subject to be set aside by a subsequent term of the court. If appellants' property was benefited by the improvement we think the city was authorized to assess it its proportionate share according to the benefits it
100 had received. The city could not in 1910 annul or set aside the former assessment in so far as it had been confirmed, but in our opinion it could assess the property as to which there had been no confirmation of the previous assessment.

It is contended that the ordinance of January 24, 1910, annulling the former assessment proceeding and directing a new assessment made, was not in force when the supplemental petition was filed, for the reason that the ordinance at that time had not been signed by

the mayor and only one day had elapsed after the passage of the ordinance by the city council before the petition was filed. Whether the point is well taken or not, the validity of this assessment, it would seem, was not dependent on the validity of the ordinance. The judgment of the circuit court refusing confirmation of the former assessment against appellants' property and dismissing the petition as to their property was an anulment of the assessment as to that property by the order and judgment of the court. By the failure to file the remanding order of this court within two years the city abandoned that particular suit but not the cause of action, (Koon vs. Nichols, 85 Ill. 155; Philadelphia & Reading Coal & Iron Co. vs. City of Chicago, supra;) and that proceeding was thereby discontinued, the effect of which was to leave the assessment under that proceeding annulled and set aside, and no further steps could be taken against appellants' property under the first supplemental petition. The amount to be paid by the special assessment was fixed and determined by the judgments in the condemnation suits, and no ordinance describing the improvement or estimate of its cost by commissioners was necessary to authorize the assesment under the second supplemental petition.

The ordinance under which the condemnation proceedings were had provided that the cost of widening the street should be paid for by special assessment on the property benefited, and section 53 authorized the city to file a supplemental petition for an assessment for the purpose of raising the amount necessary to pay the damages awarded for property taken or damaged. Pearson vs. City of
101 Chicago, 162 Ill. 383, involved the validity of the same assessment under a second supplemental petition that was before this court in Philadelphia & Reading Coal & Iron Co. vs. City of Chicago, supra, and one objection made to the validity of the assessment there was, that the supplemental petition did not recite the ordinance authorizing the improvement and the report of the commissioners of its cost, as required by section 22 of article 9 of the Cities and Villages act of 1872. The court said: "This proceeding was not under that section but under section 53 of said article 9, which contains no such requirement, and what was said in that case (Guild vs. City of Chicago, 82 Ill. 472,) concerning the other section is of no importance in this. Under section 53 the supplemental petition is based upon the condemnation judgment, and there is no estimate of the commissioners as to the cost of the improvement previous to the filing of the petition." While that was not the precise question here involved, we see no more reason for requiring the passage of an ordinance by the city annulling an assessment that was already annulled before filing the supplemental petition, than there is for requiring the petition in a proceeding under section 53 to recite an ordinance authorizing the improvement. Under the ordinance providing for the condemnation of the property and the payment therefor by special assessment and the condemnation proceedings had thereunder, no other ordinance was required to be passed before the supplemental petition for the assessment could be filed. At the time the last supplemental petition was filed the assessment as to all property except that of appellants could not be annulled or set

aside by ordinance, and as to appellants' property the assessment made under the former petition had already been annulled. In our opinion, therefore, an annulling ordinance was not required.

It is also contended that it appears on the face of the roll that the assessment is unjust and should have been recast or modified by the court. An examination of the grounds upon which this assignment of error is based convinces us that, under the rule announced
102 in Allen vs. City of Chicago, 176 Ill. 113, and Betts vs. City of Naperville, 214 Id. 380, we would not be justified in reversing the judgment on that ground.

Other alleged errors of minor importance are urged, but we find no error in the record requiring a reversal of the judgment of the circuit court, and the judgment is affirmed.

Judgment affirmed.

At a supreme court, Begun and held at Springfield on Tuesday, the Seventh day of February in the year of our Lord One Thousand Nine Hundred and Eleven, within and for the State of Illinois.

Present:

The Honorable Alonzo K. Vickers, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable John P. Hand, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable Frank K. Dunn, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.
Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, that to-wit: on the 25th day of February, A. D. 1911, the same being one of the days of the said February term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 7387.

CITY OF CHICAGO, Appellee,
vs.
FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDGAR O. WARD, HARRY S. MECARTNEY, Appellants.

Appeal from Circuit Court of Cook County.

103 And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything

erroneous, vicious or defective, and that in that record there is no error: Therefore, it is considered by the Court that the Judgment of the Circuit Court aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellants costs by it in this behalf expended, to be taxed, and that it have execution therefor.

*Authentication of Record.*

SUPREME COURT,
*State of Illinois, ss:*

I, J. McCan Davis, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of City of Chicago, Defendant in Error, vs. Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edgar O. Ward, Harry S. Mecartney, Plaintiffs in Error, and also of the opinion of the court rendered therein as the same now appears of record in my office.

In Testimony whereof I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield this 8th day of October A. D. 1912.

[SEAL.]

J. McCAN DAVIS,
*Clerk Supreme Court.*

104 Be it remembered, to-wit, that on the Eighth day of October A. D. 1912 there was duly filed by Frank J. Willoughby, et al., appellants in this court and plaintiffs in error in the petition for writ of error herein mentioned, in the office of the Clerk of the Supreme Court of Illinois a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. Frank K. Dunn, Chief Justice of the Supreme Court of Illinois with the original order by the said Chief Justice upon the said petition allowing said writ of error, which documents are in words and figures as follows, to-wit:

In the Supreme Court of Illinois.

No. 7387.

CITY OF CHICAGO, Appellee,
vs.
FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY, Appellants.

Appeal from Circuit Court, Cook County.

*Petition for Writ of Error, Assignment of Errors, and Prayer for Reversal.*

Considering themselves aggrieved by the final decision of the Supreme Court of Illinois in rendering judgment against them in the

above entitled cause, the said Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney hereby pray a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas bond.

105 And the said Frank J. Willoughby, Louise Specht, Harry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney assign the following errors in the records and proceedings of the said cause, viz:

1. The said Supreme Court of Illinois erred in affirming the said judgment of the Circuit Court of Cook County.

2. The said Supreme Court erred in not reversing said judgment.

3. The said Supreme Court erred in deciding that the said lots of the appellants, or any of said lots, were liable to the said assessment so confirmed against them by the said Circuit Court of Cook County.

4. The said Supreme Court erred in denying the claim of appellants that said lots were not liable to said assessment.

5. The said Supreme Court erred in denying the claim of appellants that said judgment of the Circuit Court of Cook County was an impairment of contract and contrary to the "First" paragraph of "§10" of "Article I" of the Constitution of the United States, which provides that "No state * * * shall pass any * * * law impairing the obligation of contracts."

6. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Circuit Court of Cook County constituted a deprivation of appellants of their said property without due process of law, contrary to "§1" of the Fourteenth—"XIV"—Amendment to said Constitution, which provides: "Nor shall any state deprive any person of life, liberty or property without due process of law."

7. The said Supreme Court erred in denying the claim of appellants that said judgment of the Circuit Court of Cook County was a denial to appellants of the equal protection of the laws, contrary to said "§1" of said Fourteenth—"XIV"—Amendment to said Constitution, which provides: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

8. The said decision and judgment of the Supreme Court
106 of Illinois constitute an impairment of the contract evidenced by the deeds to appellants of their said lots and of the rights of appellants held and claimed thereunder, contrary to said "First" paragraph of "§10" of "Article I" of said Constitution.

9. The said decision and judgment of the Supreme Court of Illinois constitute a deprivation of appellants of their property without due process of law, contrary to said "§1" of the Fourteenth—"XIV"—Amendment to said Constitution.

10. The said decision and judgment of the Supreme Court of Illinois constitute a denial to appellants of the equal protection of the laws, contrary to said "§1" of said Fourteenth—"XIV"—Amendment to said Constitution.

For which errors the said Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney pray that the said judgment of the Supreme Court of the

State of Illinois rendered in said cause on February 25, 1911, be reversed and a judgment rendered in favor of the appellants, Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney and for costs.

ERWEH J. PRICE,
*Counsel for Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney.*

STATE OF ILLINOIS,
*Supreme Court, ss:*

Let the writ of error issue upon the execution of a bond by Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney to the City of Chi-
107 cago in the sum of One Thousand Dollars ($1,000.00) with John M. Oliver and Mark Oliver as sureties; such bond to act as a supersedeas.

FRANK K. DUNN,
*Chief Justice, Supreme Court of Illinois.* [SEAL.]

Dated September 27, 1912.

Endorsed: Filed Oct. 8, 1912. J. McCan Davis, Clerk of Supreme Court.

Be it remembered that on the 8th day of October A. D. 1912 there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edgar O. Ward and Harry S. Mecartney a- original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in words and figures as follows, to-wit:

*Bond on Writ of Error.*

In the Supreme Court of the United States.

FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD, and HARRY S. MECARTNEY, Plaintiffs in Error,

vs.

CITY OF CHICAGO, Defendant in Error.

Error to Supreme Court of Illinois.

Know all men by these presents, That we, Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O.
108 Wood and Harry S. Mecartney, of Cook County, Illinois, as principals, and John Milton Oliver and Mark Oliver of Cook County, Illinois, as sureties, are held and firmly bound unto the City of Chicago in the sum of One thousand Dollars ($1,000.00) to be paid to it, said obligee, and for the payment of which, well and

truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of September A. D. 1912.

Whereas, the above named Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney, plaintiffs in error, seek to prosecute their writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Illinois.

Now therefore, the condition of this obligation is such, That if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

| | | |
|---|---|---|
| F. J. W. | FRANK J. WILLOUGHBY. | [SEAL.] |
| L. S. | LOUISE SPECHT. | [SEAL.] |
| H. E. S. | HENRY E. SEVER. | [SEAL.] |
| ALEX. SQ. | ALEX. SQUAIR. | [SEAL.] |
| EDW. O. WOOD. | EDWARD O. WOOD. | [SEAL.] |
| | HARRY S. MECARTNEY | [SEAL.] |
| | JOHN MILTON OLIVER. | [SEAL.] |
| | MARK OLIVER. | [SEAL.] |

O. K.
LOUIS T. ORR.

Witnesses to Signatures:
——— ———.
——— ———.

109 STATE OF ILLINOIS,
*County of Cook, ss:*

John Milton Oliver and Mark Oliver, being each duly sworn on oath depose and say, each for himself:

That we each are of lawful age and are citizens of the County of Cook and State of Illinois, and know the contents of the foregoing instrument to which we have attached our names; that we are each worth above the sum of Five Thousand Dollars ($5,000.00) over and above all debts, liabilities and exemptions.

JOHN MILTON OLIVER.
MARK OLIVER.

Subscribed and sworn to before me this 24th day of September A. D. 1912.

EVERETT M. SWAIN,
*Notary Public, Cook County, Illinois.*

The above bond approved and to operate as a supersedeas.

FRANK K. DUNN,
*Chief Justice of the Supreme Court of Illinois.*

Endorsed: Filed Oct. 8, 1912. J. McCan Davis.

110 UNITED STATES OF AMERICA,
*State of Illinois,*
*Office Clerk Supreme Court of Illinois, ss:*

Be it remembered that on the Eighth day of October A. D. 1912, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error which is hereby attached and is in words and figures as follows, to-wit:

*Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judiciary of the Supreme Court of the State of Illinois, Greeting:

Because, in the record and proceedings, as also in the *recommendation* of the judgment of a plea which is in the said Supreme Court of the State of Illinois before you at the February Term 1911 thereof, being the highest court of law or equity of the said state in which such a decision could be had in the said suit, between City of Chicago, designated as plaintiff or petitioner and appellee, and Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney, designated as defendants or objectors and appellants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein
111 was drawn in question the construction of a clause of the constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened to the great damage of said defendants or objectors and appellants, Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 8th day of October, in the year of our Lord one thousand nine hundred and twelve.

[Seal of the District Court United States, Southern District Illinois.]

R. C. BROWN,
*Clerk of the District Court of the United States for the Southern District of Illinois.*

Allowed by
FRANK K. DUNN,
*Chief Justice of the Supreme Court of the State of Illinois.*

Endorsed: Filed Oct. 8 1912. J. McCan Davis, Clerk of Supreme Court.

112 *Certificate of Lodgment.*

SUPREME COURT,
*State of Illinois, ss:*

I, J. McCan Davis, Clerk of the Supreme Court Do Hereby certify that there was lodged with me as such Clerk on October 8th 1912 in the matter of Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney, plaintiffs in error, vs. City of Chicago—

1. The original bond, of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth, one for defendant in error and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Springfield, Illinois, this 8th day of October A. D. 1912.

[SEAL.]

J. McCAN DAVIS,
*Clerk Supreme Court of Illinois.*

113 Be it also remembered that on the 8th day of October A. D. 1912 a certain Citation was filed in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

*Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the People of the City of Chicago, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Illinois, wherein Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney,

are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Illinois, this 8th day of October A. D. 1912.

[SEAL.] FRANK K. DUNN,
*Chief Justice of the Supreme Court of Illinois.*

Attest:
J. McCAN DAVIS,
*Clerk of the Supreme Court of Illinois.*

114 CHICAGO, ILLINOIS, *Nov. 1st*, 1912.

I, William H. Seaton, attorney for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter appearance in the Supreme Court of the United States.

WILLIAM H. SEXTON,
*Corporation Counsel and Attorney for City of Chicago.*

Endorsed: Filed Oct. 8, 1912. J. McCan Davis, Clerk of Supreme Court.

*Return to Writ.*

UNITED STATES OF AMERICA,
*Supreme Court of Illinois, ss:*

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois in the City of Springfield this 8th day of October A. D. 1912.

[SEAL.] J. McCAN DAVIS,
*Clerk Supreme Court of Illinois.*

Office Supreme Court, U. S.
FILED
DEC 15 1913
JAMES D. MAHER
CLERK

No. 66

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY,

*Plaintiffs in Error,*

*vs.*

CITY OF CHICAGO,

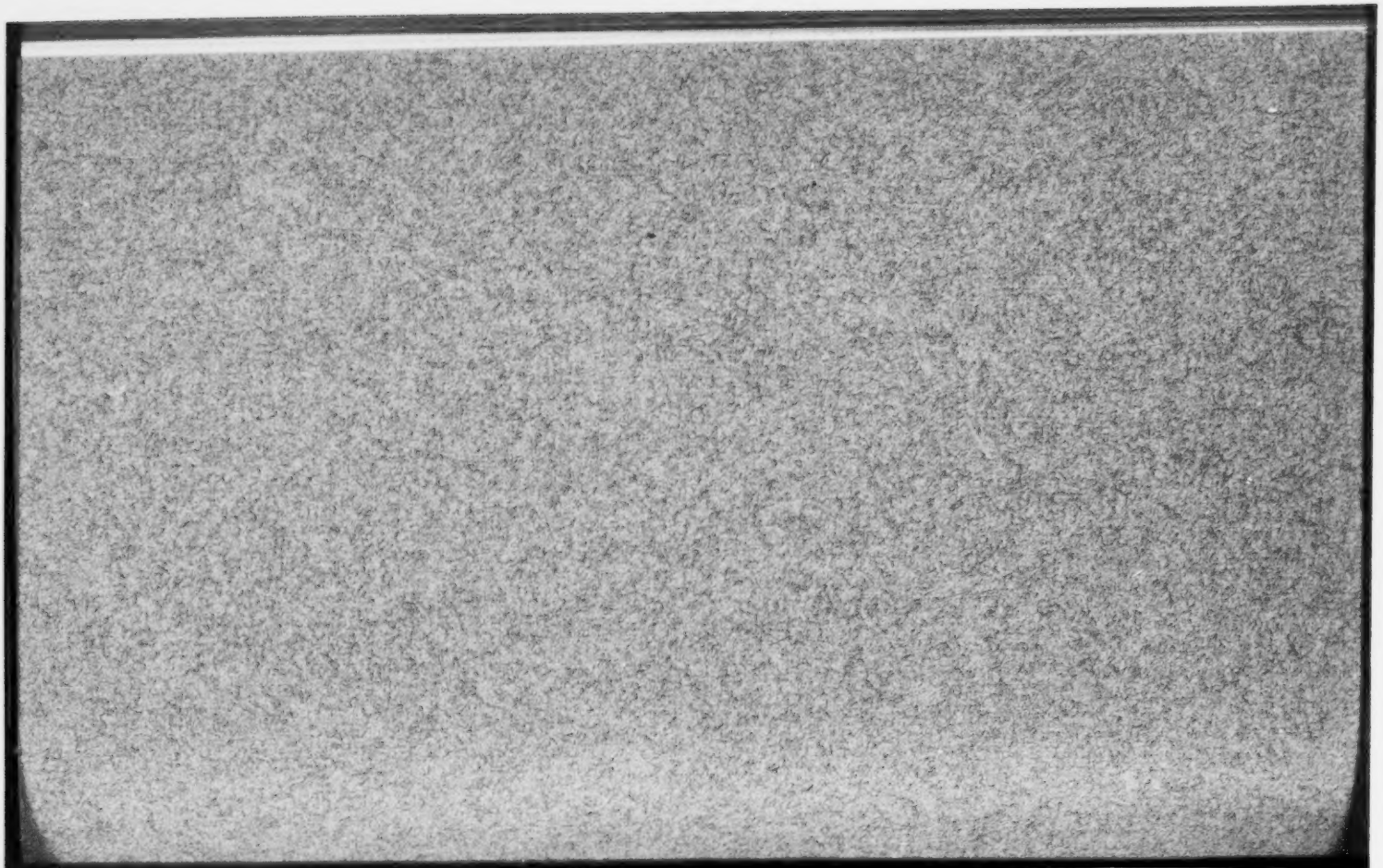
*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

## Brief of Plaintiffs in Error in Opposition to Motion to Dismiss.

CHARLES R. HOLDEN,
FOR PLAINTIFFS IN ERROR.

BARNARD & MILLER PRINT, CHICAGO



IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1913.

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FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY,

*Plaintiffs in Error,*

*vs.*

CITY OF CHICAGO,

*Defendant in Error.*

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

## BRIEF OF PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

(The references are to the "Printed Extracts" of Defendant in Error.)

MAY IT PLEASE THE COURT:

The writ of error here was sued out for the purpose of having reviewed and reversed the judgment of the Illinois Supreme Court in *Chicago* v. *Willoughby et al.*, 249 Ill. 249.

It is claimed in the brief of defendants in error that the Illinois Supreme Court did not actually decide the federal question, and therefore, that a fed-

eral question is not involved, because, "not necessary to its decision." We, however, point out that the printed "extracts" from the transcript (page 70), shows at least inferentially that the various constitutional claims were specifically made by plaintiffs in error, since it is asserted that the Supreme Court "erred in denying" such claims, viz: claims asserted under the "impairment of contract", "due process", and "equal protection" clauses of the federal constitution.

It is obvious that the Supreme Court of Illinois cannot deny such claims if valid, by simply ignoring them, and thus defeat a right to review. Out of abundant caution, therefore we print in annexed appendix (No. 1), the "constitutional" assignments of error in that court by the plaintiffs in error, who were appellants there, and which disposes of point VII of the opposing brief. "All that is essential is that the Federal questions must be presented in the State Court in such a manner as to bring them to the attention of that tribunal." *M., K. & T. Ry. Co.* v. *Elliott,* 184 U. S. 530 (534).

Here the proceeding is a levy *in rem* against the premises, and the judgment of the lower court is *per se* a deprivation of property if plaintiff in error's constitutional points are valid.

Defendant in error has not quoted the various sections of statutes, etc., of Illinois, bearing upon these proceedings, which might familiarize the court the better with the so-called "local" issues; and we therefore do so in the appendix hereto with references below. (Appendix No. 2.)

One feature of the suggestions of counsel for de-

fendants is that they themselves reveal in a number of instances the *real* ground upon which plaintiffs in error seek a review in this court.

Plaintiffs do not deny that "special assessment matters are local matters."

They do not deny that *ordinarily* "this court does not interfere with the revenue laws of the state"; nor that "a special assessment is a species of taxation"; nor that "special assessment proceedings are reviewed in this court *only in exceptional cases*", nor that "a decision of a court on a question of fact is conclusive here"; nor that *ordinarily* "this court accepts the conclusion of the state court as to the proper construction of a state statute"; nor that "a *mere* change of view by the state court does not raise a federal question under the contract clause of the U. S. constitution," etc., etc.

They do not deny any of these propositions as stated and which embody practically all the points of error defendants' brief.

But what they *do* claim is:

That this is *one* of such "exceptional cases"; that there is not involved here a mere change of view, but that this is one of the cases referred to "so *clearly* and *palpably* an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation is really *spoliation* under the power to tax." (p. 10.)

We *do* deny that the Supreme Court of Illinois "has acted in accordance with the constitution and laws of its state and its own procedure", and we assert that this is one of such "exceptional circum-

stances that this court will feel justified in saying that there has been a failure of due legal process."

We do not deny that a state has power, by specific legislation, to authorize its municipal subdivisions to levy a new assessment for cost after the public work has been ordered to be constructed in whole or in part by special assessment, and after the Supreme Court of the state has decided the particular assessment, for some lack of observing statutory or other forms of procedure, etc., to be void. Such proceedings are in effect merely the legal *ascertainment* of a *debt or benefit due from the beginning*, and the payment of which was contemplated by the original legislative act or ordinance providing for the work

But we do deny and challenge counsel to produce contrary authority, that without such specific legislation a special assessment may be spread by *mere court fiat*, without contravening the guaranties of the Federal Constitution. *That is this case.*

Nor do we claim, that merely because of a change of ownership of a lot or tract of land, the latter can escape a judgment for benefits, because the purchase was made and the property paid for after certain proceedings to collect the benefit conferred have been held technically void, and while the ruling was in force, and before the new proceedings to assess have been commenced.

But what we *do* contend is, That after proceedings to levy an assessment have become *consummate*, and where there exists *no* statutory warrant to levy any *further* assessment, or where such proceeding *is barred by a clearly worded limitation statute of*

*the state,* and where the Supreme Court of the state *has decided over and over again for a long series of years and uniformly, that a new proceeding in such a case—and in just such circumstances— is barred, and where parties have purchased a lot or tract of land in question in the open market in good faith based upon such settled and re-settled construction* of the local statute, that *then* their *rights have become vested and fixed;* and there is no shadow of *justice or law* in a decision, which attempts to *reverse* such settled construction and to uphold a new assessment made over *sixteen years* after the construction of the work, and over *thirteen years after* the purchase has been made, and *nearly seven years* after the limitation statute *has, under such settled construction, expired.*

And we further contend that it makes no difference whether such reversal of rulings is attempted by a *flat contradiction* of the prior line of cases, *or* by conceding them and *then denying* that they *apply* to a situation which is *exactly similar*—with no chance for a question or even quibble. Nor yet whether it is done by conceding here both prior rulings *and* like situation, and then hanging a proceeding which is essentially a *statutory* one, and sustaining a judgment therein, on nothing but judicial fiat.

By keeping in mind the claim of plaintiffs in error as thus announced, nearly the entire brief of defendants in error may be passed by, or adopted, for in it they substantially reveal our claim and admit its basal principles in the way of stated exceptions.

It is noticeable that considerable of the "facts"

stated in the printed motion, as well as the suggestions in the brief are somewhat beside the issue. It is hard to see any open or non-covert object in referring to Mr. Mecartney, one of the plaintiffs in error, as the "chief" or only plaintiff in error, when at the same instant it is stated "that the only interest he has in the case is in having sold the various lots" from ten to thirteen years before this stale assessment proceeding was commenced; and when it is said in the same breath, "that the sales were made in open market, and their titles *guaranteed*" by a guaranty company. Hence all the parties with the exception of the one, *being innocent purchasers in good faith, and for full value,* we do not see the propriety of the term "these *so-called* innocent purchasers."

There is not even a suggestion in the record to show that the one who sold these premises so long ago was solvent then, or has since remained solvent, or that if this assessment ultimately had to be paid, that these "so-called innocent purchasers" would not have to pay it, and lose their money and all of it.

We now submit our constructive propositions as follows, viz.:

I.

Special assessments are statutory proceedings, and without a statutory warrant, no special assessment can be levied, and this applies to new or supplemental assessments.

*Chicago* v. *Race*, 256 Ill. 209.

II.

The special assessment in question, a "supplemental" one, is "without any statutory warrant." (Section 53 referred to below, under which the proceeding was had, not expressly providing for any "Supplemental" assessment.)

III.

*a.* That a new or "supplemental" assessment, even *if* originally warranted under said Section 53 (at least a doubtful question), was barred in five years after July 2, 1908, under the *plainly worded statute*—so plain as to scarcely *bear* construction.

*b.* That if this be considered as a new or reassessment under Section 46, the same could not be levied after the confirmation judgment of July 2, 1898.

*McChesney* v. *Chicago*, 161 Ill. 110.
*People* v. *McWethy*, 165 Ill. 222.
*LeMoyne* v. *Chicago*, 175 Ill. 356.
*Rich* v. *Chicago*, 187 Ill. 396.
*City* v. *Nichols*, 192 Ill. 489.
*Doremus* v. *Chicago*, 212 Ill. 513.
*Holden* v. *Chicago*, *id.* 289.
*Chicago* v. *Hulbert*, 205 Ill. 346 (357).
*Chicago* v. *Nodeck*, 202 Ill. 257 (266).
*Noonan* v. *Chicago*, 231 Ill. 588 (591).
*Chicago* v. *Race*, 256 Ill. 209 (1912).

IV.

These owners had purchased upon the faith of this long line of *uniform* and *settled* rulings of the Supreme Court of Illinois. And hence

V.

The judgment here, based upon a square reversal of these rulings is a taking without due process of law.

*Muhlker* v. *R. R.*, 197 U. S. 544.

*Great South Hotel Co.* v. *Jones*, 193 U. S. 532.

VI.

The judgment upon its face is pure confiscation of property. The property of plaintiffs in error is taken upon the ground that it is a *public necessity*, and then they are assessed *over* $300 *more than the awards for the property taken from them.*

This is in its essence a taking without due process.

*City of Bloomington* v. *Latham*, 142 Ill. 462.

*Norwood* v. *Baker*, 172 U. S. 269.

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SUGGESTIONS.

The original proceedings to which this special assessment proceeding were supplemental was a consummated street opening proceeding under Article IX of the old "Cities and Villages," Act of 1872.

(See Rev. Stat. Ill. 1893, Chapter 24, Art. IX, or Secs. 116 to 168n.)

The ordinance for the improvement provided that "the cost of the improvement shall be paid for by *a special assessment* to be levied upon the property benefited thereby to the amount that the same may be legally assessed therefor, and *the remainder* of such cost to be paid for by *general taxation* in accordance with Article IX," etc.

This act went out of force in 1897, when the Illinois "local improvement" law came into effect (comprised within Secs. 507 to 605 of the same chapter Rev. Stat. Ill. 1911). Such law, however, did not apply to proceedings then pending or unconsummated. As to them Article IX remained and is still in force.

The strips condemned with amounts awarded were:

| | | |
|---|---|---|
| (1) | The East 37 feet of Lot 13..... | $12,025.00 |
| (2) | The South 150 feet of the East 37 feet of Lots 15 and 16 of Block 2, Yerby's Subdivision ..... | 4,162.50 |
| (3) | (Except the South 150 feet), the East 37 feet of said Lots 15 and 16.... | 3,312.38 |

(See Plat.)

The assessment here involved (total $7,783) concerns the "remainder" of Lots 15 and 16, *i. e.*, the last two pieces, for which a total award as stated had been made of $7,474.88.

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The following are facts and proceedings taken for convenience from the printed motion and state-

ments of defendant in error, simply re-stated in a different order for convenience:

The petition to condemn was filed in August, 1893, and the final judgments fixing the amounts to be paid were entered in October, 1894.

In the meantime, and in September, 1893, the city had entered upon the strips of land in question with the consent of the owner, and permanently improved them as a street, and they have been so used ever since.

After judgment in the original proceeding the city filed a supplementary proceeding to assess under Section 53 of said Article IX. (See Appendix No. 2.)

Such assessment was contested and several petitions and assessment rolls were made and annulled or withdrawn by the city.

The final petition upon which the confirmation was ultimately had was filed February 20, 1897, and the roll thereunder was filed July 14, 1897.

On April 1, 1897, the entire "remainder" of Lots 15 and 16 was re-subdivided by Mecartney, the then owner, into Lots 1 to 8, "Edgar M. Snow & Co.'s Subdivision" of the same, showing the street in question as established. (See Plat, Printed Extracts, p. 4.)

In such assesment roll, filed, as stated, several months after the resubdivision had been made, the property was assessed by these *lot* descriptions.

There was a jury trial and a verdict confirming the roll, with certain reductions.

On July 2, 1898, a final general *judgment of confirmation* was entered, confirming the entire roll, ex-

cept as to the objections of Mecartney, covering said Lots 1 to 8, and as to them a new trial was granted.

In the meantime, most of the lots in the new subdivision had been sold out, and by 1901 all had been sold—all to purchasers for value—and by the end of that year the property had all been built up with substantial flat buildings and dwellings.

The present plaintiffs in error (except Mecartney) claim ownership of the lots under such purchases, and he is interested only by having sold the lots to the grantors in title of the other plaintiffs in error and warranted the title. The sales were made in 1897 to 1900.

June 22, 1901, a hearing on the objections of Mecartney as to said Lots 1 to 8 was had before Hon. Owen P. Thompson (without a jury), who sustained said objections and dismissed the petition as to them on the merits.

He found that the matter of benefits from the street opening "had been presented, considered, involved and determined" in the original condemnation proceedings.

The city evidently was satisfied with this trial, and filed no bill of exceptions. Several years later it sued out a writ of error to the Illinois Supreme Court, and the judgment of the Circuit Court was reversed.

*City* v. *Mecartney*, 216 Ill. 377.

The cause was remanded, but again abandoned by the city, as no remanding order was filed within the two years which period expired June 23, 1907.

This had the effect of ending the proceedings as to said objections on said lots, much as a voluntary non-suit terminates a suit, but leaves the cause of action undisposed of.

The main point here involved is that the *only* cause of action the city had against the lots *after the original confirmation of the roll* was the right to bring in these lots by *supplemental* proceedings *within five years* from July 2, 1898. This is clear from Section 48 (Appendix), the only statute giving *any* authority to further levy in the circumstances.

On January 25, 1910, *nearly twelve years* after the confirmation of the roll, the city filed a petition for a new assessment against these eight lots, alleging the passage of an ordinance "annulling" all former proceedings for a special assessment to pay the awards, had an *ex parte* order entered vacating all proceedings taken; and on March 1, 1910, an assessment roll was filed which adopts the same district fixed in the confirmed roll of 1898, and in which said *original* roll is practically copied, with the exception of these eight lots in question (which was necessary and proper in a "supplemental assessment"), and then credits all property outside of the eight lots the full amount of its assessment.

A trial was had in the spring of 1910 by jury, which sustained the assessment by verdict, and judgment was entered.

The objectors appealed to the State Supreme Court, which affirmed.

The general theory of the special assessment system, and the Illinois system in particular, is this:

That there are some public improvements which, though open to the entire public of a municipality for actual use, and to a definite degree needed by the entire public, are more *particularly* needed by a particular or *local* district, and hence in their market effect confer a particularly local market benefit immediately upon their construction.

It is obvious that within this local district, formally ascertained and fixed, various lots or tracts are benefited in greater or less degree than others, varying usually according to the distance from the improvement, etc.

Now, in making such an assessment, the commissioners and court, first estimate the *total cost* of the proposed *improvement;* next, that they ascertain how much of this cost ought to be borne by the public and how much should be assessed as *local* benefit to the *entire* district assessed.

Having found this latter item—assessable against the district—they are *then* to assess each lot or tract therein its *proportion* of this "district" item.

Then, if objections be filed to the entire roll as so spread, a trial is had and the roll confirmed—or corrected or readjusted, as the case may be and then confirmed.

Each lot owner, therefore, has an interest in the assessment on all other lots in the district, at least in the aggregate benefit taxed against the entire district. He has a right to object that the district assessed is less in extent than that locally benefited,

*i. e.*, that the district is assessed too much; he is to be charged only with his due *proportion* of a *district aggregate properly adjusted* as between the district *and* the entire public or municipality.

When once a confirmation of an assessment roll is had,—with or without exceptions as to any particular lot assessment,—and the *term of court* at which the confirmation is had has gone by, there can be no setting aside of the confirmation, no new roll made, nor any change in the limits of the district assessed.

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The present proceeding on its face is anomalous. Defendant printed enough to show that the local district here assessed was the property on the west side of South Park avenue extending from 51st to 60th streets, or one entire mile of frontage, *i. e.*, 5,270 feet. (Printed Extracts, p. 23.)

The proceeding assumed that that entire mile specially needed the removal of this particular jog in the street. The two tracts constituting Lots 15 and 16—the one being 150x200 ft. deep, facing the avenue, and the other about 120x200 ft., facing the avenue, each had a street frontage on two sides, viz., one on South Park avenue 29 ft. wide, and the other on Ross avenue and 56th street respectively.

Along the east side of this mile of street was a public park.

If the entire mile were locally benefited, it would seem that the local park should be charged with one-half of that benefit. And it would further seem that the "remainder" of Lots 15 and 16, consisting of the two tracts in question, *ought not to be charged all of*

*the amount of benefit arising from removing that part of the jog taken* from such lots, nor even all which was assessable for the one mile of frontage on *one* side of the street.

A man owns a piece of property, bears its burdens and pays the taxes thereupon. It constitutes a jog in the street, and which jog even though a *damage* to the entire street and the abutting property thereon is *no inconvenience* to him. Proceedings are commenced and his property, "the jog," is condemned and he is awarded $7,474.88.

*He is specially assessed* $7,783.60!

*And this as his* PROPORTIONATE *share of the entire district damaged by the jog, and hence benefited by its removal!*

*This is not merely forcing him to* GIVE *his land, but also to pay about* $300 *for the* PRIVILEGE *of giving it!*

What does all this mean?

It is obvious that the continued defense against this levy is simply a fight for justice; and when it is shown that the court which heard the entire merits of the original or final hearing in 1901 of the objections filed for these lots had found entire benefit from the assessment had been paid *or allowed* for in the condemnation verdict, a *prima facie* defense even to the proceeding on its *original* merits is convincingly made out.

The whole attempt of the city from the beginning has obviously been to save its general fund from paying anything substantial for a general improvement; secondly, to save the park property immedi-

ately adjoining from paying a dollar of the cost; and thirdly, to make the party in this instance *give his land and pay something for the pricilege of giving it.*

The framers of our constitution fully recognized the fact that state Supreme Courts as a rule would do justice to citizens in litigated causes but that *occasionally* some violent attempt—and under a mistaken policy—to save the public treasury moneys which it fairly owed, or to restore to it moneys which the negligence of its own servants had lost, and to do this in the face of rights acquired in good faith, would come into evidence. And they tendered every national citizen so oppressed an appeal to this court. They acted wisely.

———o———

It is elementary and must be conceded that no special assessment can be levied unless there be an *express statutory warrant* therefor. It is also settled that no *new assessment* or *re-assessment* or supplemental assessment can be had unless there is *express statutory warrant* therefor.

Now all statutory warrant for making assessments under the old Article IX was contained in Sections 46, 47 and 48 (See Appendix) (corresponding in substance to Sections 57, 59 and 60 of the present Illinois Local Improvement Law referred to *supra.*

Section 46 applied to cases where an assessment *in its entirely* had been found deficient or irregular, and the *entire* proceeding or assessment roll had been withdrawn or "annullel" by the council or board of trustees *or* "set aside by any court"—thus

clearing the field for an *entirely new* assessment as an entire *original* proceeding.

Section 47 related to "deficiency" assessments. It applied to a case where the estimate of a prospective improvement had turned out to be less than the cost. The new proceeding was had to collect this deficiency. It was always based upon the original assessment roll and the findings and proportions therein fixed. This section is not material here.

Section 48 applied to a case where an original assessment had been made and *a judgment of confirmation* had been entered, and in some manner or other some property *originally in the roll* had been left out or escaped payment, etc., by reason of some technical error in the proceedings, etc.—in which case the "delinquent" property could be brought in upon the "order of the city council or board of trustees."

Such a proceeding it is needless to say, was a purely *supplemental* one, and was always based upon the confirmed assessment and roll, and when the new property was actually assessed it was thus *fitted into* the prior proceedings and the record thereof.

(*The present case presents the* EXACT CONTINGENCY *provided for in this section and the Supreme Court properly found that the proceeding was barred in five years from July 2, 1898, or July 2, 1903.*)

Now Section 53 related to a supplemental proceeding for assessment in an *eminent domain* case prosecuted by the city. It only covered the case of

"*an assessment.*" It did *not* specifically provide for any *re*-assessment or *new* or "deficiency" assessment or *supplemental* assessment, and there seems absolutely no *express* warrant for any but the *one* assessment.

After providing for the filing of the petition and the estimate of costs in addition to the amount fixed by the eminent domain awards, it provided: "Like proceedings in making *said assessment* shall be had and *the assessment* shall be made, collected and enforced in the same manner as near as may be as is provided in this article *in other cases.*"

Now it is perfectly clear that *either* there was but *one* assessment and *one* confirmation authorized under this statute, *or else such supplemental proceedings are absolutely dependent upon the other three sections relating to assessment in general, and them only.*

The Supreme Court of Illinois holds properly that Section *47* does not apply here. It also holds that it has no remedy under Section *48* on account of the five years' limitation.

And it *cannot* hold that Section 46 applies, for the *term had gone by* at which the original assessment had been confirmed, and there *could* validly *be* no "annulment"; and there *has been* no "setting aside" by any court.

Then where does the court find its stautory warrant to make this new assessment?

IT SIMPLY DOES NOT EXIST.

The court does say that appellee, the city,

"*relies* upon Sections 46 and 53 as authorizing

the assessment and the method pursued in causing it to be made and confirmed."

But the case is *absolutely outside* of Section 46, *and 53 is totally barren of new assessment provisions.*

That is, there is no *general* statute on assessments which can be enforced or appealed to. And Section 53 contains *no provision for any* but the one assessment, *unless* it be held that "like proceedings in making said assessment" means like proceedings in making assessments *and re-assessments and new assessments*, etc. Now, even if we do allow this strained interpretation, we can only hang the new assessment upon either of the three sections, 46, 47 or 48, two of which are expressly and properly excluded by the court here, and the third (46) by a host of settled rulings listed under Point III above.

*LeMoyne* v. *Chicago*, *supra*. is a good sample from this list. It was a condemnation suit commenced June 2, 1912, for opening a street under Section 53 of city act (as here) and verdict and judgment of award was entered.

An assessment roll was later confirmed. Afterwards the property owner, John Chant, moved the court to dismiss the original *condemnation* proceedings for failure of the city to pay within two years. The court granted the motion and the suit was dismissed.

Afterwards, on May 27, 1896, the city filed a *new petition to condemn* the same property. A new verdict and judgment were entered therein. The city filed a supplemental petition to reassess upon the *new* judgment. Objections to the *second* assessment

were sustained upon the ground that no matter what became of the original condemnation suit the *confirmation* of the *original* assessment was binding; that the subject of what the *assessment* should be was *res adjudicata;* and that court *had no power to ignore* nor the council to *annul* it, etc.

Section 46 relates only to an original assessment as an *entirety* which has been "annulled" by the city council or village trustees *or* "set aside" by any court. And this the court properly holds in analyzing the *Hutt* and *Reading* cases.

It is clear from the statutes themselves, as is said in the Doremus case, 212 Ill. 513:

> "That after the first assessment had *been confirmed* 'the ONLY *authority*' to make a new assessment 'must be found in Section 60' (identical with old Section 48) 'under which it could *only have done so within five years* from the confirmation of the original assessment.' '*Having failed to act within the time required by the statute, it was barred and its action without force or effect.*'"

THIS PROCEEDING, THEREFORE, IS SIMPLY HUNG IN THE AIR.

If this is not a plain case of taking without due process of law, we are unable to say what is.

It appears in the record in the case that the objections to this assessment are not made for the sake of escaping an assessment, but to fight against a *double* assessment. The trial court did not allow us to put in all the proof, but there is enough in the record to make it *morally certain*, independently of the finding by Judge Thompson, who heard all the evidence, both on preliminary objections and on the merits.

Therefore, there is no reason at all why the court should hesitate to recognize this as a taking of property without *any legal warrant whatsoever*, and hence without due process of law.

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We need cite but two cases on these constitutional grounds, viz.: *Muhlker* v. *R. R.*, 197 U. S. 544, and *Great South. Hotel Co.* v. *Jones*, 193 U. S. 532, where it was settled that where one has purchased property upon the faith of the construction of a local statute by the state court, the Federal Court will interfere in a case where such state court afterwards attempts to *reverse* its settled construction to the prejudice of the purchaser.

But *supposing* a proceeding *purely statutory* in its nature is commenced against the property of a citizen without *any* statutory warrant therefor *at all;* and suppose that there has been *no* prior case on the subject. Is it not clear that such citizen is prejudiced by a judgment against him just as much as in the case of one purchasing under a specific statute, which originally *might* be fairly liable to either of *two* constructions?

In the latter case there might be some *excuse* for the levy while under the former there *clearly is none at all.*

Certainly a state court could unconsciously act just as arbitrarily by seizing property with *no* color of statutory law, as it could by reversing its specific rulings *construing* a statute reasonably *open* to either construction.

There is absolutely no ground to warrant a Fed-

eral Court declining to interfere in a case of a bald appropriation without the *semblance* of warrant, and yet interfering where the state court simply changes its construction of a statute and where *some* color of law is given to the proceeding under which the levy or seizure is made.

As a matter of fact, we volunteer the opinion that the cases of interference on account of a change of construction should be limited to those cases where the original construction was *clearly right* in the opinion of the Federal Supreme Court appealed to for a review. For we believe that a court should be at liberty to change *wrong* rulings and that the ultimate ends of justice are subserved by its doing so when it is clearly of opinion that it has erred in a matter of *substantive justice* and *pure legal principle.*

Here, however, the petitioners have a *double* foundation for their appeal, viz.:

First, that the *construction* of Section 46 as evidenced by the dozen or more cases extending over a period of nearly twenty years *was not only settled,* but was *clearly right and just;* and,

Second, there is *no semblance* of statutory warrant for this proceeding.

———o———

The opinion of the Illinois Supreme Court rendered in this case is a good example of the false reasoning and contradictory statement even a conscientious court will occasionally fall into when it loses sight of its one great duty to *declare the law* and then apply that law to the facts in hand with-

out fear or favor; and instead first determines to reach a given disposition of the facts before it, and then tries to bend and twist the law to fit and sustain that disposition of the facts.

Courts' solicitude to do what they conceived to be "right" in the facts before them, has led to much more frequent violation of constitutional guaranties than ignorance or wrong intention.

In this case the city in making this so-called "new assessment" proceeded avowedly under Section 46 of Article IX of the Act of 1872 by passing an ordinance nullifying the proceedings already taken to collect an assessment to pay for the property condemned *in toto*. On filing the petition for this new assessment it secured an *ex parte* order nullifying all proceedings already taken in accordance with the said ordinance. The trial court proceeded throughout on the theory that it was acting under Section 46 *and no other section*.

The Supreme Court confronted by the logic of its numerous decisions holding that Section 46 was only applicable when the original and *entire* proceeding had been nullified by a court for *inherent* error and not by the *legislative fiat* of the municipal council, repudiated the city's theory and correctly held that Section 46 *by itself* furnished no sanction for this proceeding.

The court also holds that Section 47 (the "deficiency" section) does not furnish a basis for the *new* assessment attempted here (extracts from transcript, foot p. 64), and likewise that Section 48 is not applicable.

Section 53, standing alone, as already pointed out,

clearly authorizes nothing more than "*a* supplemental petition" for "*an assessment.*" After specifying initial steps therein it proceeds: "Like proceedings in making *said assessment* shall be had, and the assessment shall be made, collected and enforced in the same manner, as near as may be as is provided in this article in other cases."

It has never been held in Illinois that "in other cases", *i. e.*, in cases where improvements not involving condemnatory proceedings are made by special assessment, "new" assessments could be made under Section 46 or any other sections except when the first assessment was set aside for *inherent error in the whole proceeding*, as in *Phil. & Reading C. & S. Co.* v. *Chgo.*, 158 Ill. 9. Where property was dismissed from the assessment by voluntary non-suit, by involuntary non-suit, by order of court or otherwise, there is no shadow of authority either in the statutes of Illinois or the decisions outside of this case for the repetition of the first proceeding by filing a "second" petition or making a "second" assessment for the same purpose as the first.

The Illinois Supreme Court in its opinion in effect concedes that Sections 46 and 53 standing *separately*, contain no authority for doing what was done in this case. No attempt is made to show that there is any *inter relation* between the two sections that makes their *combined weight any greater than their separate weight for the purpose in hand.* Any such attempt by either court or counsel would have been futile; so the court contents itself with saying (Extracts, p. 65):

> "No proceeding could be had against appellant's property under the first supplemental

> petition; and the assessment made thereunder after the failure to file the remanding order of this court within the time required by statute, *but the city was not without authority, under Sections* 46 AND 53, *to cause a new assessment of it to be made.*" (Italics ours.)

Otherwise stated, "zero" added to "zero" no longer produces "nothing", but when manipulated the two magical circles may be fashioned into a perfectly workable substitute for legislative sanction for taxation—unless the federal constitution, as interpreted by this court, furnishes a refuge from such sleight-of-hand interpretation of state statutes for the harassed owner of property.

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The point of the whole matter is that if there is no *sanction* in the *statutes* of Illinois for this proceeding, the expression of an opinion by the Supreme Court of that state that the city *had* the power or "was not without authority" to assess the property in question, does not furnish such sanction but only makes more clear the point that the special assessment in question is an attempt to take the property of plaintiffs in error without "due process of law," to which the Supreme Court of Illinois has attempted to add its sanction.

It is respectfully suggested that the motion to dismiss should be denied.

Respectfully submitted,

CHARLES R. HOLDEN,
*For Plaintiffs in Error.*

## APPENDIX NO. 1.

### Assignment of Errors
### (in Illinois Supreme Court).

Now comes the appellants, Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mecartney, in the above entitled cause, and jointly and severally aver and show to the Supreme Court of Illinois, that in the said and foregoing cause there is *manifest error;* and that the said Circuit Court erred:

* * * * *

13. The said judgment is contrary to "§2" of "Article II" of the Constitution of Illinois, providing that "No person shall be deprived of life, liberty or property without due process of law."

14. The said judgment is contrary to "§13" of "Article II" of the Constitution of Illinois, providing that "Private property shall not be taken or damaged for public use without just compensation."

15. The said judgment is contrary to "§14" of said "Article II," which provides that "Every person ought to obtain by law right and justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay."

16. The said judgment is contrary to "§10" of "Article I" of the Constitution of the United States, providing that "No state shall pass any

* * * law impairing the obligation of contracts."

17. The said judgment is contrary to "§1" of the Fourteenth—"XIV"—Amendment to the Constitution of the United States, providing: "Nor shall any state deprive any person of life, liberty or property without due process of law."

18. The said judgment is contrary to the provision in said last quoted section which provides: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

Wherefore, these appellants pray that the said judgment of the Circuit Court may be reversed.

(Signed) Louis T. Orr,
Jacob H. Hopkins,
Enoch J. Price,
*For Appellants.*
Richard W. Clifford,
*Of Counsel.*

## APPENDIX NO. 2.

"ARTICLE IX CITES," ETC. ACT OF 1872.

(Rev. Stat. Ill., 1891, Chap. 24, Secs. 46, 47 and 48.)

"VACATION OF ASSESSMENT—NEW ASSESSMENT.] §46. If any assessment *shall be annulled by the city council* or board of trustees, *or set aside by any court*, a *new assessment* may be made and returned, and like notice given and proceedings had, as herein required in relation to the first; and all parties in interest shall have the like rights, and the city council or board of trustees and court shall perform like duties and have like power in relation to any subsequent assessment, as are hereby given in relation to the first assessment.

"SUPPLEMENTAL ASSESSMENTS.] §47. If, in any case, the first assessment prove *insufficient*, a second may be made in the same manner, as nearly as may be, and so on, until sufficient moneys shall have been realized to pay for such public improvement. If too large a sum shall, at any time, be raised, the excess shall be refunded ratably to those to whom it was paid.

"NEW ASSESSMENTS AGAINST DELINQUENTS—LIEN —LIMITATION.] §48. If, from any cause, any city or village should *fail to collect* the *whole* or any portion of *any special assessment which may be levied*, which shall not be canceled or set aside by *the order of any court*, for any public improvement

authorized to be made and paid for by special assessment or special tax, the city council or board of trustees may, at *any time within five years after the confirmation of the original assessment, direct* a *new* assessment to be made upon the *delinquent* property for the amount of such *deficiency*, and the interest thereon from the date of such original assessment—which assessment shall be made, as near as may be, in the same manner as is herein prescribed for the first assessment. In all cases where partial payment shall have been made on such former assessment, they shall be credited or allowed on the new assessment to the property for which they were made, so that the assessment shall be equal and impartial in its results. If such new assessment prove insufficient, either in whole or in part, the city council or board of trustees may, at any time *within said period of five years*, order a third, and so on, to be levied in the same manner and for the same purpose; and it shall constitute no legal objection to such assessment that the property may have changed hands, or been incumbered, subsequent to the date of the original assessment, it being the true intent and meaning of this section to make the cost and expense of all public improvements, to be paid for by special assessment, a charge upon the property assessed therefor, *for the full period of five years, from the confirmation of the* ORIGINAL *assessment*, and for such longer period as may be required to collect, in due course of law, any new assessment ordered within that period.

* * * * *

"EMINENT DOMAIN SUITS—SUPPLEMENTAL PETITION TO ASSESS BENEFITS.] § 53. Whenever any city

or village shall apply to any court for the purpose of making just compensation for property taken or damaged by such proceedings as are authorized by this act, such city or village may file in the same proceedings a supplemental petition, praying the court to cause that *an assessment* be made for the purpose of raising the amount necessary to pay the compensation and damages which may be or shall have been awarded for the property taken or damaged, with the costs of the proceeding. The said court shall have power, at any time after such supplemental petition shall have been filed, to appoint three commissioners to make *such assessment* and to ascertain, as near as may be, the costs incurred to the time of such appointment, and the probable further costs of the proceedings, including therein the estimated costs of making and collecting such assessment, and shall direct such costs to be included by such commissioners in making said assessment. *Like proceedings* in making said assessment shall be had, and *the assessment* shall be made, collected and enforced in the same manner, as near as may be, *as is provided in this article in other cases.*"

(Here follows the provision as to forcing the city to elect to take and pay for property condemned within two years from condemnation judgment, etc.)

Office Supreme Court, U. S.
FILED
NOV 25 1913
JAMES D. MAHER
CLERK

No. 86.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY,

*Plaintiffs in Error,*

*vs.*

CITY OF CHICAGO,

*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

## BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS.

WILLIAM H. SEXTON,
CORPORATION COUNSEL,
ATTORNEY FOR DEFENDANT IN ERROR.

PHILIP J. McKENNA,
HOWARD F. BISHOP,
OF COUNSEL.

BARNARD & MILLER PRINT, CHICAGO.

(23,422)

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

No. 377.

FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY,

*Plaintiffs in Error.*

vs.

CITY OF CHICAGO,

*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

## BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS.

### STATEMENT.

MAY IT PLEASE THE COURT:

A statement of the facts upon which this motion is based is contained in the printed motion submitted herewith.

The right of defendant in error to a dismissal upon its motion involves the often adjudicated proposition that the taxing power of a state is not open to review in this court, except in cases so oppressive

that the taxation amounts to a confiscation of property. Our motion to dismiss is based upon the theory that the power of taxation is one of the sovereign powers of a state. In this case the state had fixed by statute the method of taxation, a jury of the plaintiffs' peers has fixed the exact amount of taxation (pp. 28-31, Rec.), and this court is asked to review, first, the construction placed by the Supreme Court of Illinois on a state statute, and second, to hold that the verdict of the jury, who inspected the premises sought to be assessed for benefits, is confiscatory. It would seem that this statement alone is sufficient to show that this court has no jurisdiction in this case.

# BRIEF.

## I.

SPECIAL ASSESSMENTS ARE LOCAL MATTERS.

*Spencer* v. *Merchant*, 125 U. S. 345.

Cooley, Taxation, 3d Ed., p. 68.

## II.

THIS COURT DOES NOT INTERFERE WITH REVENUE LAWS OF STATE.

*French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324.

*Witherspoon* v. *Duncan*, 4 Wall. 210, 217.

*Williams* v. *Supervisors of Albany*, 122 U. S. 154, 164.

*Shaefer* v. *Werling*, 188 U. S. 516, 517.

a. A special assessment is species of taxation.

*French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 343, 344.

*C. & A. R. R. Co.* v. *City of Joliet*, 153 Ill. 649.

*County of Adams* v. *City of Quincy*, 130 Ill. 566.

b. Special assessment proceedings are reviewed in this court only in exceptional cases.

*Lombard* v. *West Chicago Park Commissioners*, 181 U. S. 33.

*Spencer* v. *Merchant*, 125 U. S. 345.

Cooley, Taxation, 3d. Ed., p. 55.

*Davidson* v. *New Orleans*, 96 U. S. 97.

*City of Seattle* v. *Kelleher*, 195 U. S. 351, 359.

Cooley, Taxation, 3d. Ed., p. 1280.

*Williams* v. *Supervisors of Albany*, 122 U. S. 154.

## III.

DECISION OF STATE COURT ON QUESTION OF FACT IS CONCLUSIVE.

*Spencer* v. *Merchant*, 125 U. S. 345, 353.

*Building & Loan Association* v. *Ebaugh*, 185 U. S. 114, 121.

*Egan* v. *Hart*, 165 U. S. 188.

*Western Union Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92, 103.

*Bement* v. *National Harrow Co.*, 186 U. S. 83.

## IV.

THIS COURT ACCEPTS THE CONCLUSION OF THE STATE COURT AS TO THE PROPER CONSTRUCTION OF A STATE STATUTE.

*Baltimore Traction Co.* v. *Baltimore Belt R. R. Co.*, 151 U. S. 137.

*Green* v. *Neal*, 6 Peters 291.

*Davie* v. *Briggs*, 97 U. S. 628.

*Louisvillle, etc., Ry.* v. *Mississippi*, 133 U. S. 587, 590.

*City of Chicago* v. *Mecartney*, 216 Ill. 377.

*In re Converse*, 137 U. S. 624, 631.

*Turner* v. *Wilkes County Commissioners*, 173 U. S. 461.

## V.

A CHANGE OF VIEW BY THE STATE COURT DOES NOT RAISE A FEDERAL QUESTION UNDER THE CONTRACT CLAUSE OF THE U. S. CONSTITUTION.

*Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479.

*Knox* v. *Exchange Bank*, 12 Wall. 379, 383.

*St. Paul, etc., Ry.* v. *Todd Co.*, 142 U. S. 282, 286.

*New Orleans Water Works Company* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 30.

*Railroad Co.* v. *Rock*, 4 Wall. 177, 181.

*Bacon* v. *Texas*, 163 U. S. 207, 220.

*Winona & St. Peter R. R.* v. *Plainview*, 143 U. S. 371, 393.

## VI.

PLAINTIFFS IN ERROR HAVE NOT BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

*Allen* v. *Georgia*, 166 U. S. 138, 140.

*McQuade* v. *Trenton*, 172 U. S. 636, 639.

*Kelly* v. *Pittsburgh*, 104 U. S. 78.

*Central Land Company* v. *Laidley*, 159 U. S. 103, 112.

## VII.

NO FEDERAL QUESTION WAS DECIDED BY THE ILLINOIS SUPREME COURT, NOR WAS ANY FEDERAL QUESTION NECESSARY TO ITS DECISION. THEREFORE, THE WRIT SHOULD BE DISMISSED.

*Marrow* v. *Brinkley*, 129 U. S. 178, 181.

*McQuade* v. *Trenton*, 172 U. S. 636, 639.

*Harrison* v. *Morton*. 171 U. S. 38.

*Bacon* v. *Texas*, 163 U. S. 207.

*Kreiger* v. *Shelby R. R. Co.*, 125 U. S. 39.

*Desaussure* v. *Gaillard*, 127 U. S. 216.

*Hale* v. *Akers*, 132 U. S. 554.

*Hopkins* v. *McLure*, 133 U. S. 380, 386.

*Bacon* v. *Texas*, 163 U. S. 207, 227.

*Eustis* v. *Bolles*, 150 U. S. 361.

*Beauprè* v. *Noyes*, 138 U. S. 397, 401.

*Rutland R. R.* v. *Central Vermont R. R.*, 159 U. S. 630.

*Gillis* v. *Stinchfield*, 159 U. S. 658, 660.

*Seneca Nation of Indians* v. *Christy*, 162 U. S. 283.

## ARGUMENT.

### I.

This case is a proceeding by the City of Chicago for the confirmation of a special assessment to pay for certain condemnation awards on the theory that the property assessed is specially benefited by the condemnation proceeding. The case involves the right of a state acting through a municipality to tax its subjects in special assessment proceedings in proportion to benefits conferred. The decision of the state court upon the question of fact that benefits were actually received by plaintiffs in error is not reviewable on writ of error by the Supreme Court of the United States. This point is more fully discussed under "Point III."

The theory of special assessments as expressed by this court in determining jurisdictional questions is well set forth in *Spencer* v. *Merchant*, 125 U. S. 345, which language is quoted by Cooley, in his work on Taxation, 3d Edition, Volume I, page 68, to illustrate the present law on this subject:

> "Concerning special assessments for local improvements, it has been declared by the highest court that 'in the absence of any more specific restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property

generally, or from the lands benefited by the improvements, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and thereby bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. * * * But the legislature has the power to determine, by the statute imposing the tax, what lands which might be benefited by the improvement are, in fact, benefited; if it does so, its determination is conclusive upon the owners and the courts.'"

## II.

IT IS NOT THE PROVINCE OF THIS COURT ORDINARILY TO INTERFERE WITH THE POLICY OF THE REVENUE LAWS OF A STATE OR WITH STATUTES PROVIDING FOR MAKING LOCAL IMPROVEMENTS BY SPECIAL ASSESSMENT.

*French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324.

*Witherspoon* v. *Duncan*, 4 Wall. 210, 217.

*Williams* v. *Supervisors of Albany*, 122 U. S. 154, 164.

*Shaefer* v. *Werling*, 188 U. S. 516, 517.

A SPECIAL ASSESSMENT IS LEVIED UNDER THE TAXING POWER OF A STATE AND IS A SPECIES OF TAXATION.

*French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 343, 344.

*C. & A. R. R. Co.* v. *City of Joliet*, 153 Ill. 649.

*County of Adams* v. *City of Quincy*, 130 Ill 566.

A case almost identical with the case at bar recently arose in the case of *Lombard* v. *West Chicago*

*Park Commissioners,* 181 U. S. 33, which case arose on a writ of error from the Supreme Court of Illinois. In that case a local improvement had already been completed by the West Chicago Park Commissioners. Special assessment proceedings had been had to pay for this improvement, but the original ordinance providing for the levy of the special assessment to pay for the improvement in question had been declared void by the Supreme Court of Illinois. After the work had been completed, however, new authority for the levy of an assessment was supplied by an Illinois Act of the legislature of 1895. Since this act was passed after the work was completed and after the previous ordinance had been declared void, it was contended by plaintiff in error that since no authority existed at the time the work was done sufficient to justify an assessment, that the assessment under the later authority violated the 14th Amendment to the Federal Constitution, since it amounted to a taking of property without due process of law and a denial of the equal protection of the laws. This court, however, cited the case of *Spencer* v. *Merchant*, 125 U. S. 345, and held as follows, on page 42 of the Lombard case:

> "It is no longer open to question that where a special assessment to pay for particular work has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work."

The court further on in the same opinion makes this comment at page 44:

> "The theory lying at the foundation of all the arguments advanced to show that the court

> below committed error of a federal nature is this, and nothing more, that the equal protection of the laws was denied by the Supreme Court of Illinois, because that court, although it treated the assessing ordinance as invalid for the purposes of first assessment, upheld that ordinance as valid for the second assessment. This but asserts that because it is considered that there was inconsistency in the reasoning by which the Supreme Court of Illinois sustained its conclusion, therefore the equal protection of the laws was denied. If the proposition as thus understood was held to be sound, which cannot be, every case decided by the courts of last resort of the several states would be subject to the revisory power of this court, wherever the losing party deemed that the reasoning by which the state court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same court in former cases."

Applying the reasoning of this case to the case at bar we understand that it is the contention of opposing counsel that in upholding the validity of this particular assessment the Supreme Court of Illinois made a decision inconsistent with its former decisions. While we do not believe that there is that inconsistency, in the decision of the Illinois Supreme Court in the case at bar, which opposing counsel contends, still even if there is this inconsistency it is not open to review by this court. On this subject of taxation Cooley in his work on Taxation, 3rd Edition, at page 55, has this to say:

> "In order to bring taxation imposed by a state, or under its authority, within the scope of the provision of the 14th amendment which prohibits the deprivation of property without due process of law, the case should be so clearly and palpably an illegal encroachment upon

> private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the power to tax. A state has the right to devise its own system of taxation free from federal interference."

This statement is clearly supported by the case of *Davidson* v. *New Orleans*, 96 U. S. 97.

In the case of *City of Seattle* v. *Kelleher*, 195 U. S. 351, a special assessment was levied to pay for the expense of opening a street after the work was done, in which particular this case is exactly parallel with the case at bar. Before the completion of the work, the municipality levying the assessment had power to include a portion of the expense of the assessment in the general taxes and to levy the assessment on a valuation basis, which would have resulted in a smaller assessment to the objecting property owner than actually did result according to the later assessment. It seems that after the work had been completed the earlier statute allowing the municipality to include a portion of the expense in the general taxes was repealed. According to the later statute, in force after the completion of the improvement under which statute the assessment was actually levied, the full expense of the improvement had to be borne by the property owner. He complained that the new statute deprived him of property without due process of law, denied him the equal protection of the laws, and impaired the obligation of a contract. On this point the court held at page 359:

> "The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done;"

citing Cooley on Taxation, 3rd Edition, page 1280, and *Williams* v. *Supervisors of Albany,* 122 U. S. 154. The court further held:

> "A re-assessment may be a new assessment. Whatever the Legislature could authorize, if it were ordering an assessment for the first time, it equally could authorize, notwithstanding a previous invalid attempt to assess. The previout attempt left the city free to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property."

The court further held that the ordinary rule of law protecting *bona fide* purchasers for value without notice did not apply when it came to a matter of taxation; that there was no such thing as a *bona fide* purchaser for value in such a case. So that there would be the same power to re-assess or to make a new assessment upon the same property regardless of the fact that it might have changed hands in the meantime. In the case at bar there were previous attempts made to assess this property. All of these attempts failed, some because the city was forced to withdraw its petition, and one because the remanding order of the State Supreme Court reversing the decision of the lower court denying the assessment was not filed. We understand that in the meantime the ownership of the property changed hands, although the record shows that the original owner is still the party in interest. However that may be, on the authority of the case of *City of Seattle* v. *Kelleher,* we understand that it is immaterial as to whether the property assessed in this proceeding

has changed hands or not. The correct doctrine is clearly stated on page 360 of the Seattle case as follows:

> "A man cannot get rid of his liability to a tax by buying without notice. Cooley, Taxation, 3d Edition, 527, 528. Indeed, he cannot buy without notice, since the liability is one of the notorious incidents of social life. In this case the road was cut through the plaintiff's land, and if he had looked, was visible upon the ground. Whether it had been paid for was for him to inquire. The history of what had happened would have suggested that it was not improbable that sooner or later a payment must be made."

## III.

THE DECISION OF THE STATE COURT ON A QUESTION OF FACT IS CONCLUSIVE. THE QUESTION OF SPECIAL BENEFIT IN ASSESSMENT CASES AND THE PROPERTY TO WHICH IT EXTENDS IS OF NECESSITY A QUESTION OF FACT AND WHEN THE LEGISLATURE DETERMINES IT IN A CASE WITHIN ITS GENERAL POWER, ITS DECISION MUST OF COURSE BE FINAL.

*Spencer* v. *Merchant*, 125 U. S. 345, 353.

A QUESTION OF FACT IN THE STATE COURT IS A QUESTION OF FACT IN THIS COURT.

*Building & Loan Association* v. *Ebaugh*, 185 U. S. 114, 121.

THIS COURT WILL NOT RE-EXAMINE THE EVIDENCE, BUT WILL TAKE THE FACTS AS FOUND IN THE COURT BELOW:

*Egan* v. *Hart*, 165 U. S. 188.

*Western Union Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92, 103.

*Bement* v. *National Harrow Co.*, 186 U. S 83.

Applying the reasoning of these cases to the case at bar, the lower court of Illinois by the verdict of the jury determined that there was a special benefit to the property of plaintiffs in error, and the Supreme Court of Illinois has affirmed that decision.

## IV.

IT HAS BEEN HELD THAT IT IS THE DUTY OF THIS COURT TO ACCEPT THE CONCLUSION OF A STATE COURT AS TO THE PROPER CONSTRUCTION OF THE STATUTE OF A STATE.

*Baltimore Traction Co.* v. *Baltimore Belt R. R. Co.*, 151 U. S. 137.

*Green* v. *Neal*, 6 Peters 291.

*Davie* v. *Briggs*, 97 U. S. 628.

*Louisville &c. Ry. Co.* v. *Mississippi*, 133 U. S. 587, 590.

The question at issue in this case is whether the City of Chicago in levying the assessment now before this court acted under Sections 46 and 53 of Article IX of the Cities and Villages Act of Illinois of 1872, and the amendments thereto, or whether it acted under Sections 47 and 48 of said article of said Act. It is contended by counsel that in levying a supplemental assessment to pay for a condemnation award that a municipality is bound to observe the five-year limitation for the levying of a supplemental assessment. The Supreme Court of Illinois, however, held that this five-year limitation period of Section 48 applied only to cases where an assessment had already been confirmed but had not been collected, and that then the municipality had five

years within which to take further steps for its collection. The Supreme Court of Illinois further held that under Section 47 of Article IX of said Cities and Villages Act of Illinois of 1872 a municipality was given power to levy a supplemental assessment where an assessment had already been confirmed, but where the amount proved to be insufficient. The Supreme Court of Illinois then held that in the case at bar no assessment had ever been confirmed, and consequently, Section 46 of Article IX of the Act of 1872 applied, and neither Section 48 or Section 47 had any bearing. It seems that in the case of *City of Chicago* v. *Mecartney*, 216 Ill. 377 (the defendant there being the same party whose interest is here involved) an attempt had been made by the City of Chicago to levy a supplemental assessment to pay for these condemnation awards. The lower court denied the right of the city upon the ground that in the original condemnation proceeding, which determined that there were no damages to property not taken, questions of special benefit had been adjudicated. The Supreme Court of Illinois reversed this holding of the lower court and held that while in the original condemnation proceedings benefits might have been offset against damages so as to produce the result that there were no damages to property not taken, still the fact that there were no damages to property not taken was not conclusive of the proposition that there might be benefits to the property not taken in the condemnation proceedings. Through inadvertence, the remanding order in this case of *City of Chicago* v. *Mecartney* was not filed in the lower court, which, according to the de-

cision of the court in this case, viz., *City of Chicago* v. *Willoughby et al.*, 249 Ill. 249 (pages 428-442 Rec.) worked an abandonment of the assessment proceedings so that no confirmation of any assessment existed against the property in question before this court. Under Section 53 of Article IX of the Cities and Villages Act of Illinois of 1872, the Supreme Court of Illinois held that in order that supplemental proceedings might be had for the payment of an award, the original condemnation proceeding was to be considered as pending until all lands sought to be taken were paid for. The question at issue then is this, did the Supreme Court of Illinois properly construe the various sections of Article IX of the Cities and Villages Act of Illinois of 1872? The plaintiffs in error contend that the Supreme Court of Illinois did not properly construe the various sections of Article IX of that Act. On this point we believe that it is the duty of this court to accept the conclusion of the state court as to the proper construction of a state statute. This court has held in the case of *In re* Converse, 137 U. S. 624, 631:

> "A state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."

It has been held in the case of *Turner* v. *Wilkes County Commissioners*, 173 U. S. 461, that where the Supreme Court of a state has done nothing more than construe its own constitutional statutes, in holding that county bonds issued in aid of a railroad were void under such laws, which were in force at

the time the bonds were issued, there being no legislative action subsequently on the subject, the United States Supreme Court has no jurisdiction to review the correctness of the decision on a writ of error to the state court under the allegation that a contract has been impaired thereby. This is true even although the last decision is inconsistent with a previous decision on this same subject.

## V.

A CHANGE OF VIEW BY THE HIGHEST COURT OF A STATE ON A PARTICULAR PROPOSITION DOES NOT RAISE A CASE, UNDER THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION, WHICH CAN BE REVIEWED IN THE SUPREME COURT OF THE UNITED STATES.

*Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479.

It has been held in the case of *Knox* v. *Exchange Bank*, 12 Wall. 379, 383, that a judicial construction of a law different from a former judicial construction of the same law did not constitute an impairment of the obligation of a contract under the contract clause of the Federal Constitution.

The case of *St. Paul etc. Ry.* v. *Todd Company*, 142 U. S. 282, 286, quotes from Justice GRAY in the case of *New Orleans Water Works Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18, 30, as follows:

> "In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obli-

> gation have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of the courts.

To the same effect is the case of *Railroad Company* v. *Rock*, 4 Wall. 177, 181.

The case of *Bacon* v *Texas*, 163 U. S. 207, 220, contains the following statement:

> "The argument involves the claim that jurisdiction exists in this Court to review a judgment of a state court on writ of error when such jurisdiction is based upon an alleged impairment of a contract by reason of an alteration by a state court of a construction theretofore given by it to such contract or to a particular statute or series of statutes in existence when the contract was entered into. Such a foundation for our jurisdiction does not exist."

If the Supreme Court of Illinois had given effect to a legislative enactment which impaired the obligation of a prior contract, there might possibly be some ground for counsel's contention that this case comes within the contract clause of the Federal Constitution. We believe, however, that the only complaint that can be made by opposing counsel is that a state decision contrary to former state decisions has impaired the obligation of a contract, not that the State Supreme Court has held a law subsequent to the formation of a certain contract to be valid. It has been held in the case of *Winona and St. Peter R. R.* v. *Plainview*, 143 U. S. 371, 393, that this court has jurisdiction only when the state court has given effect to a legislative enactment which impairs the obligation of a prior contract.

## VI.

PLAINTIFFS IN ERROR HAVE NOT BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

On this point we desire to quote from the case of *Allen* v. *Georgia*, 166 U. S. 138, 140, which is quoted in the case of *McQuade* v. *Trenton*, 172 U. S. 636, 639, as follows:

> "To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly what due process of law consists, it is sufficient to say that if the Supreme Court of a state had acted in consonance with the constitution and laws of its state and its own procedure, it could only be in very exceptional circumstances that this Court would feel justified in saying that there had been a failure of due legal process. *We might ourselves have pursued a different course in this case, but that is not the test.* The plaintiff in error must have been deprived of one of his fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference." (Italics ours.)

In the case of *Kelly* v. *Pittsburgh*, 104 U. S. 78, the court holds that a party is not deprived of his property without due process of law by the enforced collection of taxes, merely because they, in individual cases, work hardships or impose unequal burdens.

This court said in *Central Land Company* v. *Laidley*, 159 U. S. 103, 112:

> "When the parties have been fully heard in the regular course of judicial proceedings an er-

> roneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the fourteenth amendment of the Constitution of the United States."

## VII.

IT DOES NOT APPEAR AFFIRMATIVELY THAT THE DECISION OF ANY FEDERAL QUESTION WAS NECESSARY TO THE CONCLUSION REACHED BY THE SUPREME COURT OF ILLINOIS, NOR THAT A FEDERAL QUESTION WAS ACTUALLY DECIDED OR THAT THE DECISION AS RENDERED COULD NOT HAVE BEEN GIVEN WITHOUT DECIDING A FEDERAL QUESTION.

It has been held that in the absence of such showing this court has no jurisdiction on writ of error to a state court.

*Marrow* v. *Brinkley*, 129 U. S. 178, 181.

The case of *McQuade* v. *Trenton*, 172 U. S. 636, 639, holds as follows:

> "We have repeatedly held that even the decision by the state court of a Federal question will not sustain the jurisdiction of this Court, if another question not Federal were also raised and decided against the plaintiff in error, and the decision thereof be sufficient, notwithstanding the Federal question, to sustain the judgment. Much more is this the case where no Federal question is shown to have been decided, and the case might have been, and probably was, disposed of upon non-federal grounds;" citing:
>
> *Harrison* v. *Morton*, 171 U. S. 38, and
>
> *Bacon* v. *Texas*, 163 U. S. 207.

In the case at bar there has been no affirmative showing of any kind that a Federal question was act-

ually decided by the Supreme Court of Illinois or that any Federal question was necessarily involved in the decision of that court. On the contrary, the decision of the Illinois Supreme Court shows on its face that it was merely the construction of certain provisions of a local law which said law had long been in force.

While we do not believe that any Federal question is involved in the case at bar, we also maintain, that even if any Federal question was involved, that the decision of the Illinois Supreme Court was broad enough to be sustained on an entirely independent ground, and that even in such case the writ of error should be dismissed without considering the Federal question. Where there are two grounds for the judgment of a state court, one only of which involves a Federal question and the other is broad enough to maintain the decision sought to be reviewed, it is now settled that this court will not look into the Federal question inasmuch as there is another ground upon which the judgment can rest but it will dismiss the writ of error for that reason.

*Kreiger* v. *Shelby R. R. Co.*, 125 U. S. 39.
*Desaussure* v. *Gaillard*, 127 U. S. 216.
*Hale* v. *Akers*, 132 U. S. 554.
*Hopkins* v. *McLure*, 133 U. S. 380, 386.
*Bacon* v. *Texas*, 163 U. S. 207, 227.
*Eustis* v. *Bolles*, 150 U. S. 361.
*Beauprè* v. *Noyes*, 138 U. S. 397, 401.
*Rutland R. R.* v. *Central Vermont R. R.*, 159 U. S. 630.
*Gillis* v. *Stinchfield*, 159 U. S. 658, 660.
*Seneca Nation of Indians* v. *Christy*, 162 U. S. 283.

## CONCLUSION.

In conclusion, there has been in this case solely the application of the rules and principles of local law by the usual and ordinary process with an orderly and full hearing. Section 53 of Article 9 of the Cities and Villages Act of Illinois of 1872 had long been in force. It had received judicial interpretation in the case of *Philadelphia & Reading Coal & Iron Co.* v. *City of Chicago,* 158 Ill. 9, not inconsistent with the decision of the State Supreme Court in the case at bar. There was no settled line of decisions at variance with the decision in the case at bar. Not only did the highest court of Illinois not give effect to any statute subsequent to the accrual of any rights of the plaintiffs in error—for, in fact, there was no such statute passed—but that court did not even reverse or upset any well established judicial law or fixed decisions and constructions to which plaintiffs in error might under an extreme view allege that they had a vested right. Under the assurance of what state law or state decision did plaintiffs in error purchase their property, which state law or decision has been disturbed by the case at bar so as to impair the obligation of any contracts of theirs, deprive them of property without due process of law or deny to them the equal protection of the laws! But even if this latest expression of the Supreme Court of Illinois upon the taxing power of a municipality acting under certain sections of a state law

were an anomaly and in glaring inconsistency with previous decisions, how would that inject a Federal question into this case? This court has never assumed jurisdiction to harmonize the decisions of state courts on the construction of their own state statutes, much less in a matter of taxation which is a business of local concern which will not be interfered with short of actual confiscation of property. And yet the jury in the trial court found this property benefited (Rec., 28-31), which finding of fact is conclusive. The only dispute is whether the jury had any legal right to find this property benefited—in short, a matter of statutory construction.

Respectfully submitted,

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*Of Counsel.*

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Office Supreme Court, U. S.
FILED
NOV 25 1913
JAMES D. MAHER
CLERK

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No. [redacted].

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY,

*Plaintiffs in Error,*

*vs.*

CITY OF CHICAGO,

*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

## Motion of Defendant in Error to Dismiss.

WILLIAM H. SEXTON,
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PHILIP J. McKENNA,
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OF COUNSEL.

BARNARD & MILLER PRINT, CHICAGO.

(23,422)

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1913.

No. 377.

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FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY,

*Plaintiffs in Error,*

*vs.*

CITY OF CHICAGO,

*Defendant in Error.*

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

## MOTION OF DEFENDANT IN ERROR TO DISMISS.

Now comes the City of Chicago, defendant in error, by its counsel, and enters herein its motion to dismiss the writ of error in this cause, upon the ground that no Federal question is involved, and that this court is without jurisdiction to review upon this record the judgment of the state court.

## STATEMENT.

### THE FACTS.

This is a proceeding under Section 53 of Article IX of the Cities and Villages Act of Illinois of 1872 (as amended), to raise funds by special assessment

to pay certain condemnation awards rendered in the Circuit Court of Cook County in the year 1894, for the opening or widening of South Park avenue from 55th to 56th streets, in the City of Chicago.

July 24, 1894, the city council of the City of Chicago passed an ordinance providing that South Park avenue be opened from 55th street (Garfield boulevard) to 56th street. The land to be taken was the E. 37 ft. of lot 15, block 2, Yerby's Subdivision, N. ½ W. ½, N. W. ¼ and W. ½, N. E. ¼, Section 15, T. 38, R. 14, and that part south of the south line of Garfield boulevard, the E. 37 ft. of lot 13, block 2, Yerby's Subdivision. (Objectors' Exhibit 2, Plat of Snow & Company's Subdivision, p. 68, Record.)

The ordinance further provided that said improvement should be made and the cost thereof paid for by a special assessment to be levied upon property benefited thereby to the amount that the same might be legally assessed therefor, the remainder of such cost to be paid by general taxation, in accordance with Article IX of the Cities and Villages Act of Illinois of 1872.

August 29, 1893, the city filed a petition for condemnation in the Circuit Court of Cook County. The suit was entitled *City of Chicago* v. *Nina Thomasson et al.*, No. 119889.

When this petition was filed Harry S. Mecartney was the owner of lots 15 and 16, and Gwynn Garnett and Nina Thomasson were the owners of lot 13—said lot 13 fronting on 55th street (Garfield boulevard) and being separated from lots 15 and 16 by a narrow street then known as Ross street but

now as 55th place. Lots 15 and 16 fronted on Ross street (55th place) and 56th street. (Objectors' Exhibit 2, Plat of Snow & Company's Subdivision, p. 68, Record.)

Within a few days after the filing of the condemnation petition the city took possession of this strip of land, with the consent of the owners thereof, and immediately improved the same by paving, etc., making it a full 66-foot street. Prior to this time South Park avenue was a full 66-foot street, except a jog between 55th street (Garfield boulevard) and 56th street. In order to make the street uniform this condemnation proceeding was instituted.

This was during the World's Fair. It would seem that the owners of this land were as anxious to have a 66-foot street in front of their property, in place of a 29-foot street, as was the City of Chicago, for they yielded possession without even waiting for the determination of the condemnation proceedings and the payment of the awards.

January 29, 1894, a verdict and judgment were rendered for the E. 37 ft. of lot 13 for the sum of $12,025.00. As to the E. 37 feet of lot 15, an amendment was later made in the condemnation proceeding changing the description into two parcels, described as the E. 37 ft. of the S. 150 ft. of lots 15 and 16, and the E. 37 ft. of lots 15 and 16 (except the S. 150 ft. thereof).

October 26, 1894, verdicts and judgments were rendered for these two parcels, as follows: E. 37 ft. of the S. 150 ft. of lots 15 and 16, $4,162.50. For the E. 37 ft. of lots 15 and 16 (except the S. 150 ft.

thereof), $3,312.38. The total awards were $19,-499.88.

To raise this sum, and in accordance with the condemnation ordinance which was the basis of this improvement, various supplemental petitions were filed under Section 53 of Article IX, Cities and Villages Act of Illinois of 1872.

The first supplemental petition was filed December 4, 1894. An assessment roll was thereafter filed. The assessment was objected to by Mecartney and others and on December 18, 1895, the City of Chicago was compelled to dismiss its supplemental petition,—with leave to file a new petition.

December 28, 1895, a second supplemental petition was filed. To the assessment roll filed in this proceeding Mecartney and others interposed objections. A jury trial resulted in favor of the petitioner. Mecartney and others, however, obtained a new trial. The city and Mecartney then stipulated that said assessment proceedings might be dismissed, which was accordingly done, with leave to petitioner to file a new supplemental petition.

A third supplemental petition was filed February 20, 1897. A new assessment roll was filed July 14, 1897. The Mecartney property, lots 15 and 16, had been subdivided on April 1, 1897, and were then known as sub-lots 1 to 8, inclusive, of Edgar M. Snow & Co.'s sub of lots 15 and 16, of block 2, Yerby's Sub., etc., and were assessed the sum of $9,015.00. Mecartney and others resisted this assessment. A jury trial was had and on July 2, 1898, the jury returned a verdict finding the issues for

the petitioner as against all property in the roll, excepting sub-lots 1 to 8, Snow & Co.'s Subdivision (Mecartney's property). The assessment against these lots was reduced by the verdict from $9,015.00 to $6,770.00. Mecartney moved for a new trial, which was allowed as to sub-lots 1 to 8, inclusive, Snow & Co.'s Subdivision. A judgment of confirmation was thereupon rendered against the other property in the roll for the amounts set forth therein.

June 22, 1901, a new trial was had before Judge Owen P. Thompson as to the Mecartney property only, to-wit: sub-lots 1 to 8, Snow & Co.'s Subdivision. Upon the hearing of the legal objections the court found that the benefits had been determined in the original condemnation proceeding and were merged in the judgment of October 26, 1894. The court thereupon sustained the objections of Mecartney and dismissed the petition as to his property. The City of Chicago thereupon sued out a writ of error from the Supreme Court to review this judgment.

June 23, 1905, the order of dismissal entered by Judge Thompson was reversed and the cause remanded. (*City of Chicago* v. *Mecartney*, 216 Ill. 377.) The court held that the full measure of benefits was not and could not be determined in the condemnation proceeding. That the amount of benefits could be fixed only by a supplemental petition under Section 53, Article IX, of said Cities and Villages Act of 1872.

Unfortunately and through inadvertence the remanding order in this case was not filed in the trial

court by plaintiff in error nor by defendant in error within two years from the date of the reversal, which worked an abandonment of that particular proceeding but not of the cause of action. Sec. 114, Chap. 110, Hurd's Rev. Stat. (1909), of Illinois.

The other owners of property against which the judgment of July 2, 1898, was a lien, with the exception of one parcel, paid their assessments, amounting to $10,158.74. The total awards were $19,499.88.

These awards had to be paid, although by consent of the owners the city had taken possession of the property condemned.

January 24, 1910, an ordinance for a new assessment for the opening of South Park avenue from 55th street to 56th street in the City of Chicago was passed and it was ordained that the old assessment proceedings be annulled and that a new supplemental petition be filed in the Circuit Court of Cook County.

January 25, 1910, an order was entered in the Circuit Court setting aside the old assessment proceedings and granting leave to petitioner to file a new petition, which was accordingly filed. Commissioners were appointed to prepare and file and assessment roll, which was filed March 1, 1910.

In this last roll all property described in the roll confirmed July 2, 1898, was re-assessed. Lot 13, block 2, Yerby's Sub., owned by Mary E. Ryan, was reassessed $500 over and above the original assessment against said lot, confirmed July 2, 1898. Said lot, however, was given credit in the roll for the

amount of the original assessment which it had paid. The land owned by one Perkins E. Bass was also assessed and the assessment confirmed in said last roll. At the time of the trial, however, the Bass property, and lot 13 of block 2, Yerby's Sub., were dismissed out of this case because of such former judgments.

As to all other property, except sub-lots 1 to 8, Snow & Co.'s Subdivision (Mccartney's property) the present assessment roll shows this property re-assessed the amounts confirmed against it July 2, 1898, with the notation that the same had been paid. All of this property was incorporated in this new roll so as to show the proportionate share of the assessment against sub-lots 1 to 8. These lots were assessed in the new roll $7,783.60. The total assessments in said roll amounted to $20,373.88. The total credits for money already paid by the other property were $10,158.74, showing a balance to be raised with which to pay the awards of $10,215.14.

Upon the trial of this case below objections were filed by various persons, including Harry S. Mccartney. As we have before shown, objections were sustained as to lot 13 of block 2, Yerby's Sub., upon the ground that this property having once been assessed and the assessment being paid, it could not be re-assessed in this proceeding. Also the Bass property was dismissed out of the case for the reason that a judgment of confirmation had theretofore been rendered against this property and also a judgment order of sale, both of which judgments were in full force and effect at the date of this hearing.

During the trial of this cause plaintiff in error Mc

cartney endeavored to inject into the case the alleged interest of other parties upon the theory of his having deeded this property to other persons during the period between the filing of the original condemnation petition, August 29, 1893, and the filing of the new supplemental petition in this proceeding. He has the names of several individuals before his own, for the purpose, we presume, of showing the court that his interest in these lots has been somewhat diminished and that the rights of innocent third parties have accrued. He does not contend (this being a proceeding *in rem*) that the change of title creates new rights in the premises, and that the lots in question are now absolved from the payment of their share of this assessment to pay the balance due upon the condemnation awards.

The so-called innocent third parties, as was shown in the court below, are amply protected against these assessments by warranty deeds and guaranty policies. Mr. Mecartney on cross-examination reluctantly admitted that he had given bonds to the Chicago Title & Trust Company to secure the guaranted titles against assessments in case he became liable upon his warranty deeds given to these so-called innocent purchasers. (Testimony Harry S. Mecartney, pp. 196-255, Record.)

At the time of the condemnation proceedings, in 1893-4, South Park avenue at the point where these lots were situated was a narrow roadway of 29 feet. These lots sided upon said roadway. South Park avenue, north and south of this jog, however, was a 66-foot street. The taking of these 37 feet changed the frontage of these lots from 55th place and 56th

street to South Park avenue and gave them a 66-foot street, the same as all other lots on this street. The jury found for the city, and there was judgment on the verdict. (Verdict, p. 28, Record; Judgment, p. 36, Record.)

The plaintiffs in error make no attempt to attack this proceeding upon the merits, but, on the contrary, urge purely technical grounds. These grounds may be summarized as follows:

1. That the ordinance of January 24, 1910, was void.

2. That the order entered by the Circuit Court on January 25, 1910, vacating all proceedings and granting to the City of Chicago leave to file a new petition was void upon the ground that the term at which the assessment against other property was confirmed had expired and there was no power in the court to set aside the assessments as to said property.

3. That the proceeding was barred by the five-year limitation provided for in Section 48, Art. 9, Cities and Villages Act of Illinois of 1872, or if the said section did not apply, then by the laches of the city.

4. That the assessment should have been modified or recast by the court upon the ground that it was unjust.

5. That the assessment could not be levied against sub-lots 1 to 8 of Snow & Co.'s Subdivision of lots 15 and 16, Yerby's Sub., etc., and that the same should have been levied against the original lots 15 and 16 (except E. 37 feet).

6. That the court erred in ruling out the offer of prior adjudication of benefits in the original condemnation proceedings.

7. That the judgment herein is in conflict with the Federal Constitution.

The only question involved in this case is whether plaintiffs in error have been deprived of their property without due process of law by reason of the judgment of the state court in holding that their property was specially benefited by the condemnation proceedings for the opening or widening of South Park avenue from 55th and 56th streets in the City of Chicago, and in holding that the special assessment confirmed against their property to pay for such benefits was properly so confirmed. Otherwise stated, the question to be decided upon this motion is whether or not the plaintiffs in error have been deprived of their property without due process of law because of an alleged erroneous decision of the state court, here sought to be reviewed, in deciding that the property of the plaintiffs in error was subject to taxation by the City of Chicago in special assessment proceedings brought under and in pursuance of a state statute.

Inasmuch, therefore, as the record fails to present a case properly reviewable by this court upon writ of error to the Supreme Court of Illinois, we respectfully ask that the motion here presented on behalf of the defendant in error be granted, and the writ of error dismissed.

WILLIAM H. SEXTON,
*Corporation Counsel, Attorney for Defendant in Error.*

PHILIP J. MCKENNA,
HOWARD F. BISHOP,
*Of Counsel.*

Supreme Court, U. S.
FILED
APR 6 1914
JAMES D. MAHER
CLERK

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No. [redacted].

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY,

*Plaintiffs in Error,*

vs.

CITY OF CHICAGO,

*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

## Brief and Argument for Plaintiffs in Error.

CHARLES R. HOLDEN,
FOR PLAINTIFFS IN ERROR.

BARNARD & MILLER PRINT, CHICAGO

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*Defendant in Error.*

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

## Brief and Argument for Plaintiffs in Error.

(Note: This cause has been submitted—as per stipulation printed in Appendix, page 1—upon the Printed "Extracts from Transcript of Record" presented by defendant in error with its motion to dismiss the writ. Such motion was reserved by this court to the hearing on the merits. Such extracts will be referred to herein as the "Printed Record." A very few skeleton references are supplemented in the Argument below and in the Appendix.)

## STATEMENT.

This writ of error runs to the Supreme Court of Illinois, and has been sued out for the purpose of having reviewed and reversed the judgment and decision of that court reported in *Chicago* v. *Willoughby et al.*, 249 Ill. 249; (also shown on p. 62, Printed Record).

The proceeding in question is known in the Illinois law as a "supplemental" special assessment proceeding; and although commenced in January, 1910, is a supplement or sequel to a very old and a much litigated case.

It is claimed by plaintiffs in error, and we think it will fairly appear from this record, that there is here no attempt to get rid of a just burden; that the proceedings levied against the property in question have been unjust from the beginning; that they have been encouraged and perpetuated mainly by reason of repeated changes in decisions by the State Supreme Court in favor of the city; and that the present proceeding, commenced over sixteen years after the public improvement was established, is wholly without warrant of law or justice and is the unfortunate and final result of a local court policy of unconscious leniency toward a public authority in order to save it imagined loss.

We say this fully conscious of and recognizing the well-defined limits upon this court's jurisdiction to review, and mean thereby merely to ask a tolerant

attitude in advance towards an issue local in its primal aspects but pregnant with court principles—and the violation of the same—of national or universal import.

That is, more particularly stated, the plaintiffs in error in presenting the issue here recognize that primarily a construction of revenue laws, special assessment proceedings, etc., is a state or local matter, and that this court ordinarily accepts a conclusion of the state court as to a proper construction of its own statutes.

But what we do contend is, that after proceedings to levy an assessment have become consummate and where there exists *no* statutory warrant to levy any further assessment, or where such proceeding is barred by a clearly worded limitation statute of *the state*, and where the Supreme Court of the state *has decided over and over again for a long series of years and uniformly, that a new proceeding in such a case—and in just such circumstances—is barred, and where parties have purchased a lot or tract of land in question in the open market in good faith based upon such settled and re-settled construction* of the local statute, that *then* their *rights have become vested and fixed;* and there is no shadow of *justice or law* in a decision, which attempts to *reverse* such settled construction and to uphold a new assessment made over *sixteen years* after the construction of the work, and over *thirteen years after* the purchase has been made, and *nearly seven years* after the limitation statute *has, under such settled construction, expired.*

And we further contend that it makes no differ-

ence whether such reversal of rulings is attempted by a *flat contradiction* of the prior line of cases, *or* by conceding them and *then denying* that they *apply* to a situation which—with no chance for a question or even quibble—is *exactly similar*. Nor yet whether it is done by conceding here both prior rulings *and* like situation, and then hanging a proceeding which is essentially a *statutory* one, and sustaining a judgment therein, on nothing but judicial fiat.

———o———

The statutes outlining the features of the Illinois special assessment system, so far as material here, are somewhat lengthy, and the material portions thereof are printed in the appendix hereto.

A statement of the issues herein will be best understood by first explaining such proceeding, at least in rough outline.

The Constitution of Illinois (adopted in 1870) provides, §9, Article IX:

> "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation, of contiguous property, or otherwise."
>
> Hurd's Rev. Stat. of Ill., 1891, p. 68.

And in the general statutes of Illinois (Appendix, p. 2, Sec. 1), following out this provision, it is enacted:

> "The corporate authorities of cities and villages are hereby vested with power to make local improvements by special assessment, or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe."

When a local improvement is ordered, it is provided that the ordinance shall prescribe in what manner the cost shall be defrayed. (Sec. 2, *idem.*)

The statutes then provide that where private property is required to be taken, a condemnation petition may be filed by the city, owners be summoned into court, and a jury trial be had as to the "just compensation" to be paid, etc.

Later on in the act a proceeding is outlined for the levy of a special assessment, for local improvements.

It is provided that the city council shall ordain for the work and where deemed advisable order an assessment spread therefor. It provides for the filing of a petition, the appointment of commissioners to make an assessment roll, which shall set forth "the names of the owners so far as known" of the description of the lots assessed, etc. (Sec. 26); notice to owners, the filing of objections by parties desiring to contest, trial by jury and judgment confirming the assessment or sustaining the objections in whole or in part as the case may be.

When property ordered taken under eminent domain proceedings is to be paid for in whole or in part by special assessment a supplemental proceeding—in the same case—following the general special assessment act is provided for.

So that there are two separate and independent proceedings tacked together in one court record, and two separate jury trials and two separate judgments, viz., the one in condemnation and the other on special assessment.

All of the facts are of record and undisputed and are all stated in defendant's printed motion to dismiss; rendering it unnecessary here to break up a re-statement thereof with many references to the record. They practically all appear, too, in the decision of the Illinois Supreme Court. They are here simply re-stated in a different form for convenience. The entire question of jurisdiction was submitted on defendant in error's motion to dismiss, leaving for treatment here but a question of law, viz., whether or not the proceeding lacks legal warrant, or due process, etc.

The entire proceeding here is a levy *in rem* against the premises, and the judgment of the lower court creates a lien which continues for five years from the date thereof. (Sec. 48, Appendix.) Plaintiffs in error claim that the judgment here lacks legal authority and is *per se* a deprivation of property if their constitutional points are valid.

The original proceeding here involved the opening or widening of South Park Avenue in Chicago between 55th Street (otherwise known as Garfield Boulevard) and 56th Street. The ordinance providing therefor was passed August 29, 1893, and it ordained that "the cost of the improvement shall be paid for by a *special assessment*, to be levied upon the property benefited thereby, *to the amount that the same may be legally assessed therefor*, and the *remainder* of such cost *by general taxation*, in accordance with Article IX of the Cities and Villages Act," etc.

South Park Avenue, extending from 51st Street to 60th Street in Chicago—the distance of one mile—

adjoined on the west South Park, otherwise known as Washington Park. (P. R. 8, 21.)

The street was 66 feet wide the entire length of this mile, except that between Garfield Boulevard (or 55th Street) and 56th Street it was but 29 feet wide. This left a jog 37 feet wide between such cross-street limits, and it was necessary to acquire or condemn this jog in order to make the street of uniform width. (P. R. 8.)

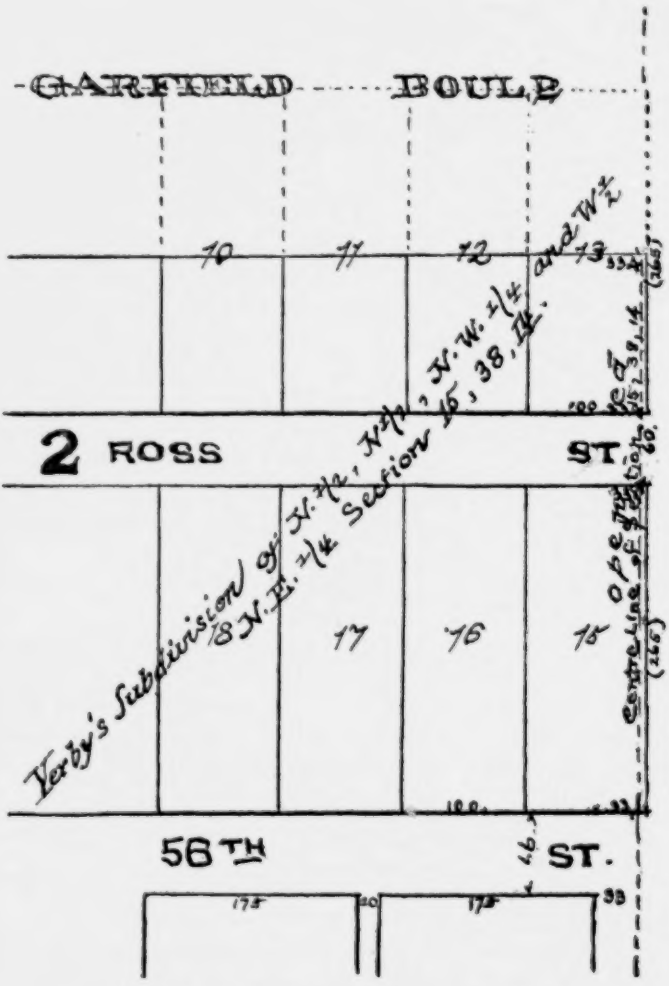
This jog—condemned in the original case at bar—judgments entered on January 29, and October 26, 1894—consisted of three parcels of land under three separate ownerships, viz.:

(1) The East 37 feet of the South 133 feet of Lot 13, Block 2, Yerby's Subdivision, etc.—Awarded $12,025.

(2) The South 150 feet of the East 37 feet of Lot 15 in said Block 2—Awarded $4,162.50.

(3) (Except the South 150 feet) the East 37 feet of said Lot 15—Awarded $3,312.38. (Or a total for the last two parcels of $7,474.78 P. R. 15, 31, 49, and Rec. 97 and 101).

The following is a copy of plat annexed to the condemnation petition (Record, 95-6), which shows these descriptions:




Immediately after filing the petition, it being in World's Fair time and the property being evidently urgently needed, the city, on or about September 1, took formal possession of the jog, with the express consent of the property owners who awaited the

later trial and verdicts as to the amount of their awards. And the street having theretofore been paved north and south thereof, the pavement over the portion to be condemned was completed, and the ordinary street improvements laid and extended thereover. The property in question has been used as a public street and as part of said South Park Avenue from that time to this. (Printed Record 8.)

Upon the hearing of the condemnation petition the second and third parcels, which together as shown by the plat consisted of the East 37 feet of Lot 15, were re-described in the petition to condemn, by amendment (not material however) as (1), the East 37 feet of the South 150 feet of Lots 15 *and 16*, and (2), (Except the South 150 feet) the East 37 feet of Lots 15 *and 16*.

Special assessment proceedings to collect such portion of the cost of the improvement as could be collected in such manner were commenced in December, 1894, and were contested by objections. Finally and by regular judgment of the court on July 2, 1898, the assessment roll was confirmed with the exception of the property in question in this record, that is, the "remainder" of Lots 15 and 16.

The issue as to the assessment of such portion was finally determined in favor of the objecting property owners in 1901, but after being reversed in 1905 upon a writ of error was abandoned and the proceeding suffered to lapse.

———o———

Plaintiff in error Mecartney at the time of the commencement of the proceedings in 1893 owned the

South 150 feet of Lots 15 and 16, and represented and was interested in the remaining parcel thereof, viz. (except the South 150 feet), Lots 15 and 16. (P. R. 5.)

After judgment in the original proceeding the city filed a supplementary proceeding in December, 1894, to assess under Section 53 of said Article IX. (See Appendix.)

Such assessment was contested and several petitions and assessment rolls were made and annulled or withdrawn by the city.

The final petition upon which the confirmation was ultimately had was filed February 20, 1897, and the roll thereunder was filed July 14, 1897.

On April 1, 1897, the entire "remainder" of Lots 15 and 16 was re-subdivided by Mecartney, the then owner of both parcels, into Lots 1 to 8, "Edgar M. Snow & Co.'s Subdivision" of the same, showing the street in question as established. (Printed Record, pp. 4 and 5.)

The plat is as follows (P. R. 4):

Approved August 1. 1897

In such assessment roll, filed, as stated, several months after the resubdivision had been made, the property—the "remainder" of Lots 15 and 16—was assessed by these *new lot* descriptions, Nos. 1 to 8, sometimes spoken of as "sub-lots."

*The total assessment thus spread over this "remainder" was* $9,017, *or over* $1,500 *more than the award for the part taken from these lots.* (Record, 120-2.)

There was a jury trial and a verdict confirming the roll, with certain reductions.

On July 2, 1898, a final general *judgment of confirmation* was entered on this verdict, confirming the entire roll, except as to the objections of Mecartney, covering said Sub-lots 1 to 8, and as to them a new trial was granted. (Record, 126.)

In the meantime, some of the lots in the new subdivision had been sold out, and by 1901 all had been sold—all to purchasers for value—and the property was gradually built up with substantial flat buildings and dwellings. (P. R. 5, 27.)

The present plaintiffs in error (except Mecartney) claim ownership of the lots under such purchases, and he is interested as an original purchaser and by having sold the lots to the grantors in title of the other plaintiffs in error and warranted the title. (Printed Record, 5, 15, 16.)

June 22, 1901, a hearing on the objections of Mecartney as to said Sub-lots 1 to 8 was had before Hon. Owen P. Thompson (without a jury), who sussustained said objections and dismissed the petition as to them *on the merits.*

He found that the matter of benefits from the street opening "*had been presented, considered, involved and determined*" in the original condemnation proceedings.

The city evidently was satisfied with this trial, and filed no bill of exceptions. Several years later it sued out a writ of error to the Illinois Supreme Court, and the judgment of the Circuit Court was reversed.

*City* v. *Mecartney*, 216 Ill. 377.

(In passing we note that although no bill of exceptions had been preserved, and although no objection was made to the form of the judgment, the Supreme Court of Illinois felt constrained to hold that in that *particular* case, the judgment should be reversed. It did not seem to realize that it was violating one of the most elementary rules of practice and jurisdiction to review known to the law. In 12 Encl. of Pl. & Pr., p. 486, there are no less than 135 cases cited to support the rule, quite a large number from Illinois.)

*Thus occurred the* **first** *reversal of prior settled rulings by the Illinois Supreme Court in this litigation.*

———0———

The cause was remanded, but again abandoned by the city, as no remanding order was filed within the two years, which period expired June 23, 1907. (As required by Sec. 114, Chap. 110, Rev. Stat. Ill. 1909, p. 1712.)

This had the effect of ending the proceedings as to said objections on said lots, much as a voluntary

non-suit terminates a suit, but leaves the cause of action undisposed of. But such cause of action in this case had by this time, as we claim and will later show, been barred by express limitations.

The main point here involved is that the *only* cause of action the city had against the lots *after the original confirmation of the roll* was the right to bring in these lots by *supplemental* proceedings *within five years* from July 2, 1898. This we claim is clear from Section 48 (See Appendix), the only statute giving *any* authority to further levy in the circumstances.

A part of the history of this litigation is shown in *City of Chicago* v. *Mecartney,* 150 Ill. App. 275; which is worthy of a side reference here as showing a remarkable mobility of rulings in this matter on the part of the State Supreme Court.

In 1907 the owners of the condemnation judgments, having brought general suits at law for the amounts thereof and waited many years for their money, brought on the cases for trial and the Circuit Court of Cook County gave them judgments therefor.

They were based upon the well recognized and thought-to-be basal proposition that while the condemnation judgments were conditional in form, yet after the city had formally taken possession of the strip for public use and had *permanently appropriated* the same with the consent of the owner, the latter's right to the award *moneys* became *eo instanti* vested and fixed. That as the city had full charter power to open and establish streets and to pay therefor by general taxation, it was immaterial to the

owner whether the city had consummated its special assessment proceedings or not. (For the entire cost had *ultimately* to be paid by the city in some form or other.) This it could do in its own good time.

This was simply carrying out a principle thought to be of universal application and to have been settled in Illinois by quite a number of well considered rulings. (*Chicago* v. *Barbian*, 80 Ill. 482, the leading case, where it was held that "the rights of the parties are reciprocal." *Chicago* v. *Smythe*, 33 Ill. App. 28; *Chicago* v. *Shepard*, 8 Ill. App. 602; *Bloomington* v. *Brockaw*, 77 Ill. 194; *Chicago* v. *Palmer*, 93 Ill. 125; *R. R.* v. *McClintock*, 68 Ill. 296.)

The Appellate Court, however, reversed the judgments, holding that the owner would have to wait until the special assessment proceedings had been exhausted.

And this ruling was lately affirmed in the Supreme Court where an application for such judgment was pressed in a different form.

*City of Chicago* v. *Thomasson*, 259 Ill. 323.

*Thus as plaintiff's in error claim, the decisions of Illinois were a* **second** *time reversed in favor of the city.*

---

On January 25, 1910, *nearly twelve years* after the confirmation of the roll, the city filed a petition for a new assessment against these eight lots, alleging the passage of an ordinance "annulling" all former proceedings for a special assessment to pay the awards, had an *ex parte* order entered vacating all proceedings taken; and on March 1, 1910, an as-

sessment roll was filed which adopts the same district fixed in the confirmed roll of 1898, and in which said *original* roll is practically copied, with the exception of these eight lots in question (which plan of roll was necessary and proper in a "supplemental assessment"), and then credits all property outside of the eight lots the full amount of its assessment.

Said assessment roll so far as the same pertains and relates to Sub-lots 1 to 8 inclusive, of Edgar M. Snow & Co.'s Subdivision, etc., shows a schedule of ownership and amount of assessment as follows (Rec., 8 to 12):

| NAME | Sub-lot. | Amt. of Assessment | Assessment Heretofore Paid | Assessment Due and Unpaid |
|---|---|---|---|---|
| Frank J. Willoughby | 1 | $1460.04 | | $1460.04 |
| " | 2 | 718.60 | | 718.60 |
| B. Whitton | 3 | 862.30 | | 862.30 |
| Alexander Squair | 4 | 862.30 | | 862.30 |
| " | 5 | 862.30 | | 862.30 |
| H. E. Sever | 6 | 862.30 | | 862.30 |
| E. C. Wood | 7 | 718.60 | | 718.60 |
| " | 8 | 1437.16 | | 1437.16 |

(Total $7,781.60.)

Forwarding sheet of commissioners, proportion of total cost estimated "will be of benefit" to property $20,373.88; "proportion total cost of benefit to the public and assessed to City of Chicago, No Dollars." (Rec., 14, 15.)

That is to say, the entire assessment levy of $20,373.88 represented the three original awards aggregating $19,499.88, the remainder, $874, representing the cost of making the assessment. Credits for their assessments were given all property in the roll other than the eight sub-lots by prior payments under the heading, "Assessment Heretofore Paid." The own-

ers so assessed are, together with Mr. Mecartney, the objectors and plaintiffs in error here, with the exception of Whitton, who deeded Sub-lot 3 (Rec., 15; Appendix, 11) to Mrs. Specht, March 6, 1909, the remaining objector and plaintiff in error. (No question has been made here, however, as to the ownership of plaintiffs in error so assessed as owners. And they each, as shown in above schedule, filed objections for their respective lots as owners thereof or parties interested therein, Mecartney objecting for all the lots as well. The objections were exhaustive, asserting lack of power in the city to make the levy and that the entire proceedings were unconstitutional and void, etc. (Rec., 15, 17, 24, 25.)

A trial was had in the spring of 1910 by jury, which sustained the assessment by verdict, and judgment was entered.

The objectors appealed to the State Supreme Court, which affirmed.

*Thus, as it is thought the decisions of Illinois have been for the* **third** *time reversed in favor of the city —all in one general litigation.*

And we now appeal to another forum.

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The special assessment act under which these proceedings were had went out of force in 1897, when another act called the "Local Improvement Law" came into effect—comprised within Secs. 507-605 of the same chapter, "Cities, Villages," etc., Rev. Stat. of Ill., 1909, pp. 453 *et seq.*

Said law, however, did not and could not apply to proceedings then pending or unconsummated, and as

to them the original Article IX remained and is still in force.

It therefore appears (1) that the city took formal and permanent possession of this land, and the same was established as a permanent public improvement in September, 1893, *over sixteen years* before this present proceeding was commenced; (2) that the original assessment had been levied and confirmed and became final July 2, 1898, nearly *twelve years* before the present proceeding was commenced.

*We seek hereinafter to show that all possible supplemental proceedings under the Illinois statute were* by *virtue of its plain terms as well as by the settled rulings in the state, barred absolutely on July* 2, 1903, *five years from the date of the judgment of confirmation of the original assessment roll as an entirety.*

It is claimed on the part of plaintiffs in error that their rights became fixed, and that they had purchased their property upon the faith of a plain statute and *that statute thoroughly and uniformly construed as barring any assessment after July* 2, 1903, and that the judgment levying this assessment impairs the contract of purchase, and is also a "taking of the property of plaintiffs in error without due process, etc."

For convenience we give the following

CHRONOLOGY.

| | |
|---|---|
| July 29, 1893, | Original ordinance providing for improvement passed. |
| Sept. 1-10, 1893, | Possession taken and street paved and the strip of land taken permanently dedicated to public use. |

| | |
|---|---|
| Jan. 9, 1894, | Verdict and judgment on East 37 feet of the South 133 feet of Lot 13, for $12,025.00. |
| Oct. 26, 1894, | Verdict and judgment as to two parcels taken of Lots 15 and 16, for $4162.50 and $3312.38 respectively. |
| Dec. —, 1894, | Supplemental petition for special assessment filed. |
| | (Here followed various special assessment proceedings resulting in no judgment and the withdrawal of two supplemental petitions.) |
| Feb. 20, 1897, | Third supplemental petition filed. |
| Apr. 1, 1897, | Resubdivision by Mecartney, the then owner of all of the "remainder" of Lots 15 and 16 into a subdivision styled "Edgar M. Snow & Co.'s Sub. of Lots 15 and 16 (except the East 37 feet thereof) of Block 2, Yerby's Sub.," and into eight lots known as Sub-lots 1 to 8. |
| July 14, 1897, | New assessment roll filed in which the "remainder" of Lots 15 and 16 is not described *except as an aggregate of separate lots*, viz., Sub-lots 1 to 8, Snow & Co.'s Subdivision, and the same are so separately assessed. |
| | The total assessment against the entire "remainder" of Lots 15 and 16 so separately assessed was $9015.00, or *about* $1500.00 *more than the entire award for such "remainder"*). |
| July 2, 1898, | Final judgment overruling all objections to assessment roll and entering judgment upon all the property assessed—being one mile of frontage on the west side of South Park Avenue from 51st Street to 60th Street, except as to objections filed to Sub-lots 1 to 8, Snow & Co.'s Subdivision. |

| | |
|---|---|
| June 22, 1901, | Finding (trial before Judge Thompson without a jury) sustaining objections of Mecartney and others as to assessment on said Sub-lots 1 to 8 and final judgment in their favor. |
| April, 1894, | Writ of error sued out by city to reverse judgment in favor of Sub-lots 1 to 8. |
| June 23, 1905, | Judgment reversed on writ of error by Supreme Court of Illinois (*Chicago* v. *Mecartney*, 216 Ill. 377). |
| June 23, 1907, | By failure to file remanding order in two years entire assessment proceeding against said Sub-lots 1 to 8 by operation of law abandoned and barred. (Section 114, Chapter 110, Rev. Stat. Ill. 1909, p. 1712.) |
| Jan. 24, 1910, | Present ordinance for a new assessment attempting to annul all prior assessment proceedings and providing for the supplemental assessment here, passed by City Council. |
| March 1, 1910, | Present assessment roll filed. (Rec., 8.) |

**Specification of Errors Relied Upon.**

Such errors are embodied in the following assignments of error (based upon those assigned in the State Supreme Court (Appendix, p. 9), viz.:

> "5. The said Supreme Court (of Illinois) erred in denying the claim of appellants that said judgment of the Circuit Court of Cook County was an impairment of contract and contrary to the 'First' paragraph of '§10' of 'Article I' of the Constitution of the United States,

which provides that 'No state * * * shall pass any * * * law impairing the obligation of contracts.'

"6. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Circuit Court of Cook County constituted a deprivation of appellants of their said property without due process of law, contrary to '§1' of the Fourteenth—'XIV'—Amendment to said Constitution, which provides: 'Nor shall any state deprive any person of life, liberty or property without due process of law.'

"7. The said Supreme Court erred in denying the claim of appellants that said judgment of the Circuit Court of Cook County was a denial to appellants of the equal protection of the laws, contrary to said '§1' of said Fourteenth—'XIV'—Amendment to said Constitution, which provides: 'Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws.'

"8. The said decision and judgment of the Supreme Court of Illinois constitute an impairment of the contract evidenced by the deeds to appellants of their said lots and of the rights of appellants held and claimed thereunder, contrary to said 'First' paragraph of '§10' of 'Article I' of said Constitution.

"9. The said decision and judgment of the Supreme Court of Illinois constitute a deprivation of appellants of their property without due process of law, contrary to said '§1' of the Fourteenth—'XIV'—Amendment to said Constitution.

"10. The said decision and judgment of the Supreme Court of Illinois constitute a denial to appellants of the equal protection of the laws, contrary to said '§1' of said Fourteenth—'XIV'—Amendment to said Constitution."

(Printed Record, p. 70.)

We now submit the following

## POINTS.

### I.

**Special assessments are statutory proceedings, and without a statutory warrant, no special assessment can be levied. And this applies to new or supplemental assessments.**

*Chicago* v. *Race*, 256 Ill. 209.

### II.

**The special assessment in question, a "supplemental" one, is "without any statutory warrant."**

(Section 53 referred to below, under which the proceeding was had, not expressly providing for any "Supplemental" assessment.)

### III.

**a. A new or "supplemental" assessment even if originally warranted under said Section 53 (at least a doubtful question), was barred in five years after July 2, 1908, under a plainly worded statute—so plain as to scarcely bear construction. And**

**b. Even if this be considered as a "new assessment" or "a re-assessment" under Section 46, the same could not be levied after the confirmation judgment of July 2, 1898.**

*McChesney* v. *Chicago*, 161 Ill. 110.
*People* v. *McWethy*, 165 Ill. 222.
*LeMoyne* v. *Chicago*, 175 Ill. 356.
*Rich* v. *Chicago*, 187 Ill. 396.
*City* v. *Nichols*, 192 Ill. 489.
*Doremus* v. *Chicago*, 212 Ill. 513.
*Holden* v. *Chicago*, *id.* 289.
*Chicago* v. *Hulbert*, 205 Ill. 346 (357).
*Chicago* v. *Nodeck*, 202 Ill. 257 (266).
*Noonan* v. *Chicago*, 231 Ill. 588 (591).
*Chicago* v. *Race*, 256 Ill. 209 (1912).

## IV.

**These owners had purchased upon the faith of this long line of uniform and settled rulings of the Supreme Court of Illinois. And hence**

## V.

**The judgment here, based upon a square reversal of these rulings is a taking without due process of law and an impairment of the contracts of purchase.**

*Muhlker* v. *R. R.*, 197 U. S. 544.
*Great South Hotel Co.* v. *Jones*, 193 U. S. 532.

## VI.

**The judgment upon its face is pure confiscation of property.**

*The property of plaintiffs in error is taken upon the ground that it is a public necessity, and then they are assessed over* $300 *more than the awards for the property taken from them.*

This is in its essence a taking without due process.

*City of Bloomington* v. *Latham*, 142 Ill. 462.
*Norwood* v. *Baker*, 172 U. S. 269.

### A Brief of the Argument.

The general theory of the special assessment system, and the Illinois system in particular, is this:

That there are some public improvements which, though open to the entire public of a municipality for actual use, and to a definite degree needed by the entire public, are more *particularly* needed by a particular or *local* district, and hence in their market effect confer a particularly local market benefit immediately upon their construction.

It is obvious that within this local district, formally ascertained and fixed, various lots or tracts are benefited in greater or less degree than others, varying usually according to the distance from the improvement, etc.

Now, in making such an assessment, the commissioners and court, first estimate the *total cost* of the proposed *improvement;* next, that they ascertain how much of this cost ought to be borne by the pub-

lic and how much should be assessed as *local* benefit to the *entire* district assessed.

Having found this latter item—assessable against the district—they are *then* to assess each lot or tract therein its *proportion* of this "district" i[illegible].

Then, if objection be filed to the entire roll as so spread, a trial is had and the roll confirmed—or corrected or readjusted, as the case may be and then confirmed.

Each lot owner, therefore, has an interest in the assessment on all other lots in the district, at least in the aggregate benefit taxed against the entire district. He has a right to object (such issue being a preliminary one tried before the court) that the district assessed is less in extent than that locally benefited, *i. e.*, that the district is assessed too much; he is to be charged only with his due *proportion* of a *district aggregate properly adjusted* as between the district *and* the entire public or municipality.

When once a confirmation of an assessment roll is had,—with or without exceptions as to any particular lot assessment,—and the *term of court* at which the confirmation is had has gone by, there can be no setting aside of the confirmation, no new roll made, nor any change in the limits of the district assessed.

———o———

The present proceeding on its face is anomalous. The local district here assessed was the property on the west side of South Park avenue extending from 51st to 60th streets, about one entire mile of frontage, *i. e.*, 5,270 feet. (Printed Record, p. 23.)

The proceeding assumed that that entire mile specially needed the removal of this particular jog in the street. The two tracts constituting the original Lots 15 and 16—the one being 150x200 ft. deep, facing the avenue, and the other about 120x200 ft., facing the avenue, each had a street frontage on two sides, viz., one on South Park avenue 29 ft. wide, and the other on Ross avenue and 56th street respectively.

Along the east side of this mile of street was a public park.

If the entire mile were locally benefited, it would seem that the local park should be charged with one-half of that benefit. And it would further seem that the "remainder" of Lots 15 and 16 *ought not to be charged all of the amount of benefit arising from removing that part of the jog taken* from such lots, nor even all which was assessable for the one mile of frontage on *one* side of the street.

A man owns a piece of property, and for years bears its burdens and pays the taxes thereupon. It constitutes in part a jog in the adjoining street, and which jog even though a *damage* to the entire street and the abutting property thereon is *no inconvenience* to him. Proceedings are commenced and his property, "the jog," is condemned and he is awarded $7,474.88.

*He is specially assessed* $7,781.60!

*And this as his* PROPORTIONATE *share of the entire district—or mile of frontage—damaged by the jog, and hence benefited by its removal!*

*This is not merely forcing him to* GIVE *his land,*

*but also to pay about* $300 *for the* PRIVILEGE *of giving it!*

What does all this mean?

It is obvious that the continued defense against this levy is simply a fight for justice; and when it is shown that the court which in 1901 heard the entire merits on the original or final hearing of the objections filed for these lots had *found the entire benefit from the assessment had been paid or allowed for in the condemnation verdict*, a *prima facie* defense even to the proceeding on its *original* merits is convincingly made out.

The whole attempt of the city from the beginning has obviously been to save its general fund from paying anything substantial for a general improvement; secondly, to save the park property immediately adjoining from paying a dollar of the cost; and thirdly, to make the party in this instance *give his land if not also pay something for the privilege of giving it.*

But outside of the fact that the only judge who heard the merits of the assessment, *found that the benefits had been allowed for* in the award; outside of the fact that no bill of exceptions to the finding of Judge Thompson was filed by the then city counsel and that the proceeding was in fact abandoned, etc., there is enough on the very face of this record to prove that the benefits *were* offset, that is enough to make the fact *morally certain.*

The east thirty-seven feet of the south part of Lot 13 (37x133) was allowed $12,025.

The two parcels of Lots 15 and 16 (37x120 and

37x150), *aggregating twice the area,* was allowed but *little over one-half as much.*

The rate allowed for the former was *three and one-half times* the allowance for the latter.

Both properties were practically vacant, the former, (Lot 13) having merely a peanut shanty on it and the latter a World's Fair hotel of 30 or 40 rooms. (P. R., 6, 23.)

The framers of our constitution fully recognized the fact that state Supreme Courts as a rule would do justice to citizens in litigated causes, but that *occasionally* some vident attempt—and under a mistaken policy—to save the public treasury moneys which it fairly owed, or to restore to it moneys which the negligence of its own servants had lost, and to do this in the face of rights acquired in good faith, would come into evidence. And they tendered every national citizen so oppressed an appeal to this court. They acted wisely.

———o———

It is elementary and must be conceded that no special assessment can be levied unless there be an *express statutory warrant* therefor. It is also settled that no *new assessment* or *re-assessment* or supplemental assessment can be had unless there is *express statutory warrant* therefor.

Now all statutory warrant for making assessments under the old Article IX was contained in Sections 46, 47 and 48 (See Appendix) (corresponding in substance to Sections 57, 59 and 60 of the present Illinois Local Improvement Law referred to) *supra.* (Rev. Stat. Il. 1909, pp. 468-9.)

This is repeatedly said in the decisions cited in the Points *supra*.

Section 46 applied to cases where an assessment *in its entirety* had been found deficient or irregular, and the *entire* proceeding or assessment roll had been withdrawn or "annulled" by the council or board of trustees *or* "set aside by any court"—thus clearing the field for an *entirely new* assessment as an entire *original* proceeding.

Section 47 related to "deficiency" assessments. It applied to a case where the estimate of a *prospective* improvement had turned out to be less than the cost. The new proceeding was had to collect this deficiency. It was always based upon the original assessment roll and the findings and proportions therein fixed. This section is not material here, since the total cost in cases of this class has, in each instance, been ascertained by the condemnation verdicts and judgments of award entered thereon.

Section 48 applied to a case where an original assessment had been made and *a judgment of confirmation* had been entered, and in some manner or other some property *originally in the roll* had been left out or escaped payment, etc., by reason of some technical error in the proceedings, etc.—in which case the "delinquent" property could be brought in by a new proceeding begun upon the "order of the city council or board of trustees."

Such a proceeding it is needless to say, was a purely *supplemental* one, and was always based upon the confirmed assessment and roll; and when the new property was actually assessed it was thus *fitted into* the prior proceedings and the record

thereof, and thus made to bear its proportion just as if it had remained in the roll and the proceedings *from the beginning.*

(*The present case presents the* EXACT CONTINGENCY *provided for in this section; and the Illinois Supreme Court properly found*—as it was compelled to find not only from the plain words of the statute but from its long line of decisions—*that a proceeding thereunder was barred in five years from July* 2, 1898, *that is on July* 2, 1903.)

Now Section 53 related to a supplemental proceeding for assessment in an *eminent domain* case prosecuted by the city. It only covered the case of "*an assessment.*" It did *not* specifically provide for any "*re*-assessment" or "*new*" or "deficiency" assessment or "*supplemental*" assessment, and there seems absolutely no *express* warrant for any but the *one* assessment.

After providing for the filing of the petition and the estimate of cost in addition to the amount fixed by the eminent domain awards, it provided: "Like proceedings in making *said assessment* shall be had and *the assessment* shall be made, collected and enforced in the same manner as near as may be as is provided in this article *in other cases.*"

*Now it is perfectly clear that* **either** *there was but* **one** *assessment and* **one** *confirmation authorized under this statute,* **or else any assessment proceedings supplemental to the first one are absolutely dependent upon the other three sections relating to assessments in general, and upon them only.**

The Supreme Court of Illinois holds properly that

Section *47* does not apply here. It also holds that it has no remedy under Section *48* on account of the five years' limitation.

And it *cannot* hold that Section 46 applies, for the *term had gone by* at which the original assessment had been confirmed, and there *could* validly *be* no "annulment"; and there *has been* no "setting aside" by any court. This is not only obvious from elementary rules of law and procedure, but the court was here, too, confronted with its long line of decisions above.

**Then where does the court find its statutory warrant to make this new assessment?**

**It simply does not exist, and the court falls into a simply arbitrary ruling and judgment —just such a one for relief from which the "impairment" and "due process" clauses were provided.**

The court does say that appellee, the city,

> "*relies* upon Sections 46 and 53 as authorizing the assessment and the method pursued in causing it to be made and confirmed."

But the case is *absolutely outside* of Section 46, *and* 53 *is totally barren of new assessment provisions.* What the city "relies on" is of no more basis for the judgment that a new sweep of the hand or a freak of the imagination.

That is, there is no *general* statute on assessments which can be enforced or appealed to. And Section 53 contains *no provision for any* but the one assessment, *unless* it be held that "like proceedings in making said assessment" means like proceedings in making assessments *and re-assessments and new as-*

*sessments,* etc. Now, even if we do allow this strained interpretation, we can only hang the new assessment upon either of the three sections, 46, 47 or 48, two of which are expressly and properly excluded by the court here, and the third (46) by a host of settled rulings listed under Point III above.

*LeMoyne* v. *Chicago, supra,* is a good sample from this list. It was a condemnation suit commenced June 2, 1912, for opening a street under Section 53 of city act (as here) and verdict and judgment of award was entered.

An assessment roll was later confirmed. Afterwards the property owner, John Chant, moved the court to dismiss the original *condemnation* proceedings for failure of the city to pay within two years. The court granted the motion and the suit was dismissed.

Afterwards, on May 27, 1896, the city filed a *new petition to condemn* the same property. A new verdict and judgment were entered therein. The city filed a supplemental petition to reassess upon the *new* judgment. Objections to the *second* assessment were sustained upon the ground that no matter what became of the original condemnation suit the *confirmation* of the *original* assessment was binding; that the subject of what the *assessment* should be was *res adjudicata;* and that court *had no power to ignore* nor the council to *annul* it, etc.

Section 46 relates only to an original assessment as an *entirety* which has been "annulled" by the city council or village trustees *or* "set aside" by any court. And this the court properly holds in analyzing the *Hutt* and *Reading* cases.

It is clear from the statutes themselves, as is said in the Doremus case, 212 Ill. 513:

> "That after the first assessment had *been confirmed* 'the ONLY *authority*' to make a new assessment 'must be found in Section 60' (identical with old Section 48) 'under which it could *only have done so within five years* from the confirmation of the original assessment.' '*Having failed to act within the time required by the statute, it was barred and its action without force or effect.*'"

**This proceeding, therefore, is simply hung in the air.**

If this is not a plain case of taking without due process of law, we are unable to say what is.

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We need cite but two cases on these constitutional grounds, viz.: *Muhlker* v. *R. R.*, 197 U. S. 544, and *Great South. Hotel Co.* v. *Jones*, 193 U. S. 532, where it was settled that where one has purchased property upon the faith of the construction of a local statute by the state court, the Federal Court will interfere in a case where such state court afterwards attempts to *reverse* its settled construction to the prejudice of the purchaser.

But *supposing* a proceeding *purely statutory* in its nature is commenced against the property of a citizen without *any* statutory warrant therefor *at all;* and suppose that there has been *no* prior decision on the subject. Is it not clear that such citizen is prejudiced by a judgment against him just as much as in the case of one purchasing under a specific statute *and a settled construction* thereof, which statute

originally *might* have been fairly liable to either of *two* constructions?

In the latter case there might be *some* excuse for the levy while under the former there *clearly is none at all.*

Certainly a state court could unconsciously act just as arbitrarily by seizing property with *no* color of statutory law, as it could by reversing its specific rulings *construing* a statute reasonably *open to* either construction.

There is absolutely no ground to warrant a Federal Court declining to interfere in a case of a bald appropriation without the *semblance* of legal warrant, and yet interfering where the state court simply changes its construction of a statute and where *some* color of law is given to the proceeding under which the levy or seizure is made.

We therefore assert that plaintiffs in error here have a *double* foundation for their appeal to this court, viz.:

First, that the *construction* of Section 46 as evidenced by the dozen or more cases extening over a period of nearly twenty years *was not only settled,* but was *clearly right and just;* and,

Second, there is *no semblance* of statutory warrant for this proceeding.

———o———

The opinion of the Illinois Supreme Court rendered in this case is a good example of the false reasoning and contradictory statement even a conscientious court will occasionally fall into when it

loses sight of its one great duty to *declare the law* and then apply that law to the facts in hand without fear or favor; and instead first determines to reach a given disposition of the facts before it, and then tries to bend and twist the law to fit and sustain that disposition of the facts.

Courts' solicitude to do what they conceived to be "right" in the facts before them, has led to much more frequent violation of constitutional guaranties than ignorance or wrong intention.

In this case the city in making this so-called "new assessment" proceeded avowedly under Section 46 of Article IX of the Act of 1872 by passing an ordinance nullifying the proceedings already taken to collect an assessment to pay for the property condemned *in toto*. On filing the petition for this new assessment it secured an *ex parte* order nullifying all proceedings already taken in accordance with the said ordinance. The trial court proceeded throughout on the theory that it was acting under Section 46 *and no other section*.

The Supreme Court confronted by the logic of its numerous decisions holding that Section 46 was only applicable when the original and *entire* proceeding had been nullified by a court for *inherent* error and not by the *legislative fiat* of the municipal council, repudiated the city's theory and correctly held that Section 46 *by itself* furnished no sanction for this proceeding.

The court also holds that Section 47 (the "deficiency" section) does not furnish a basis for the *new* assessment attempted here (P. R. foot p. 64), and likewise that Section 48 is not applicable.

Section 53, standing alone, as already pointed out, clearly authorizes nothing more than "*a* supplemental petition" for "*an assessment.*" After specifying initial steps therein it proceeds: "Like proceedings in making *said assessment* shall be had, and the assessment shall be made, collected and enforced in the same manner, as near as may be as is provided in this article in other cases."

It has never been held in Illinois that "in other cases", *i. e.*, in cases where improvements not involving condemnatory proceedings are made by special assessment, "new" assessments could be made under Section 46 or any other sections except when the first assessment was set aside for *inherent error in the whole proceeding*, as in *Phil. & Reading C. & S. Co.* v. *Chgo.*, 158 Ill. 9—a sequel to the case of *Hutt* v. *Chicago*. (This the State Supreme Court admits and expressly points out the distinction (middle p. 66, P. R.).). Where property has been dismissed from the assessment by voluntary non-suit, by involuntary non-suit, by order of court or otherwise, there is no shadow of authority either in the statutes of Illinois or the decisions outside of this case for the repetition of the first proceeding by filing a "second" petition or making a "second" assessment for the same purpose as the first.

The Illinois Supreme Court in its opinion in effect concedes that Sections 46 and 53 standing *separately*, contain no authority for doing what was done in this case. *No attempt is made to show that there is any* **inter relation** *between the two sections that makes their* **combined weight any greater than their separate weight for the purpose in hand.** Any such attempt by either court or counsel

would have been futile; so the court contents itself with saying (Extracts, p. 65):

> "No proceeding could be had against appellant's property under the first supplemental petition; and the assessment made thereunder after the failure to file the remaining order of this court within the time required by statute, *but the city was not without authority, under Sections* 46 AND 55, *to cause a new assessment of it to be made.*" (Italics ours.)

Otherwise stated, "zero" added to "zero" no longer produces "nothing", but when manipulated the two magical circles may be fashioned into a perfectly workable substitute for legislative sanction for taxation—unless the federal constitution, as interpreted by this court, furnishes a refuge from such sleight-of-hand interpretation of state statutes for the harassed owner of property.

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The point of the whole matter is that if there is no *sanction* in the *statutes* of Illinois for this proceeding, the expression of an opinion by the Supreme Court of that state that the city "*relies* on" certain sections of statute which the court *actually repudiates*, or that the city "was *not without authority*" to assess the property in question, does not furnish such sanction but only makes more clear the point that the special assessment in question is an attempt to take the property of plaintiffs in error without "due process of law," to which the Supreme Court of Illinois has attempted to add its sanction.

It is respectfully suggested that the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

CHARLES R. HOLDEN,
*For Plaintiffs in Error.*

# APPENDIX.

SUPREME COURT OF THE UNITED STATES.

October Term, 1913.

No. 377.

Frank J. Willoughby, Louise Specht, Henry E. Sever *et al.*,
*Plaintiffs in Error,*
vs.
The City of Chicago.

*In Error to the Supreme Court of the State of Illinois.*

STIPULATION AS TO PRINTED RECORD.

IT IS HEREBY STIPULATED by and between the parties to the above entitled cause that the above cause may be submitted and heard upon such parts of the record as are shown in the printed record filed in connection with the motion of defendants in error to dismiss the writ of error, which was lately reserved by order of this court to the hearing on the merits.

CHARLES R. HOLDEN,
*For Plaintiffs in Error.*

A. H. SEXTON,
PHILIP J. MCKENNA,
*For Defendants in Error.*

HOWARD F. BISHOP,
*Of Counsel.*

ILLINOIS STATUTES.

Chapter 24, Illinois Rev. Statutes, "Cities, Villages and Towns" (Act of 1872).

Hurd's Revised Stat. 1891, p. 268, *et seq.*

## ARTICLE IX.

SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS.

"POWERS CONFERRED.) Sec. 1. That the corporate authorities of cities and villages are hereby vested with power to make local improvements by special assessment or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe.

"ORDINANCE FOR IMPROVEMENT.) Sec. 2. When any such city or village shall by ordinance, provide for the making of any local improvement, it shall, by the same ordinance, prescribe whether the same shall be made by special assessment or by special taxation of contiguous property, or general taxation, or both.

"WHEN PROPERTY IS TAKEN, ETC.) Sec. 3. Should said ordinance provide for improvements which require the taking or damaging of property, the proceeding for making just compensation therefor shall be as follows:

"PETITION.) Sec. 4. Whenever any such ordinance shall be passed by the legislative authority of any such city or village, for the making of any improvement mentioned in the first section of this act, or any other local improvement that such city or village is authorized to make, the making of

which will require that private property be taken or damaged for public use, such city or village shall file a petition in some court of record of the county in which such city is situated, in the name of the city, praying that "the just compensation to be made for private property to be taken or damaged for the improvement or purpose specified in such ordinance shall be ascertained by a jury."

"FORM OF PETITION.) Sec. 5. Such petition shall contain a copy of the said ordinance, certified by the clerk, under the corporate seal, a reasonably accurate description of the lots, parcels of land and property which will be taken or damaged, and the names of the owners and occupants thereof, so far as known to the board or officer filing the petition, and where any known owners are non-residents of the state, stating the fact of such non-residence."

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P. 270:

"HOW MADE.) Sec. 18. When the ordinance under which said local improvement is ordered to be made shall provide that such improvement shall be wholly or in part made by special assessment, the proceedings for the making such special assessment shall be in accordance with the sections of this act (article) from 18 to 51, inclusive."

"ORDINANCE—FOR SIDEWALKS—OWNERS' RIGHTS.) Sec. 19. Whenever such local improvements are to be made wholly or in part by special assessment, the said council in cities, or board of trustees in villages, shall pass an ordinance to that effect specifying therein the nature, character, locality and description of such improvement."

(Section 20 provides for the making of an estimate of cost, etc.)

"ORDER FOR PROCEEDINGS IN COURT.) Sec. 21. On such report being made, and approved by the council or board of trustees, as the case may be, it may order a petition to be filed by such officer as it shall direct, in the county court of its county, for proceedings to assess the cost of such improvement in the manner provided in this act."

"PETITION TO COURT.) Sec. 22. The petition shall be in the name of the corporation, and shall recite the ordinance for the proposed improvement and the report of such commission, and shall pray that the cost of such improvement may be assessed in the manner prescribed by law."

"APPOINTMENT OF COMMISSIONERS—OATH.) Sec. 23. Upon the filing of such petition the court shall appoint three competent persons as commissioners, who shall take and subscribe an oath, in substance as follows, to wit," etc.

* * * * *

"DUTY OF COMMISSIONERS.) Sec. 24. It shall be the duty of such commissioners * * * to estimate what proportion of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city or village and such property, so that each shall bear its relative equitable proportion; and having found said amounts, to apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally bene-

fited by such improvement: Provided, that no lot, block, tract or parcel of land shall be assessed a greater amount than it will be actually benefited," etc.

* * * * *

"ASSESSMENT ROLL—RETURN.) Sec. 26. They shall also make or cause to be made an assessment roll, in which shall appear the names of the owners, so far as known, a description of each lot, block, tract or parcel of land, and the amount assessed as special benefits thereto, and in which they shall set down as against the city or village the amount they shall have found as public benefit, and certify such assessment roll to the court by which they were appointed, at least ten days before the first day of the term at which a final hearing thereon shall be had."

Here follows provisions for notice to owners and parties interested and then Ill. 30 that "any party interested in any real estate to be affected by such assessment may appear and file objections," etc.

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P. 272:

HEARING—JURY.) Sec. 31. On the hearing, the report of the commissioners shall be competent evidence, and either party may introduce such other evidence as may tend to establish the right of the matter. The hearing shall be conducted as in other cases at law, and if it shall appear that the premises of the objector are assessed more or less than they will be benefited, or more or less than their proportionate share of the cost of the improvement, the jury shall so find, and also find the amount for which such premises ought to be assessed, and judgment shall be rendered accordingly.

JUDGMENT SEVERAL—APPEAL, ETC.—LIEN.) Sec. 34. The judgment of the court shall have the effect of a several judgment as to each tract or parcel of land assessed, and any appeal from such judgment or writ of error shall not invalidate or delay the judgment, except as to the property concerning which the appeal or writ of error is taken. Such judgment shall be a lien upon the property assessed, from the date thereof until payment shall be made.

P. 274:

GENERAL REVENUE LAWS APPLY.) Sec. 44. The general revenue laws of this state, in reference to proceedings to recover judgments for delinquent taxes, the sale of property thereon, the execution of certificates of sale and deeds thereon, the force and effect of such sales and deeds, and all other laws in relation to the enforcement and collection of taxes and redemption from tax sales, except as herein otherwise provided, shall be applicable to proceedings to collect such special assessment. (See "Revenue," ch. 120, Sec. 191-225.

P. 27:

"VACATION OF ASSESSMENT—NEW ASSESSMENT.] § 46. If any assessment *shall be annulled by the city council* or board of trustees, *or set aside by any court*, a *new assessment* may be made and returned, and like notice given and proceedings had, as herein required in relation to the first; and all parties in interest shall have the like rights, and the city council or board of trustees and court shall perform like duties and have like power in relation to any subsequent assessment, as are hereby given in relation to the first assessment.

"SUPPLEMENTAL ASSESSMENT.] §47. If, in any case, the first assessment prove *insufficient*, a second may be made in the same manner, as nearly as may be, and so on, until sufficient moneys shall have been realized to pay for such public improvement. If too large a sum shall, at any time, be raised, the excess shall be refunded ratably to those to whom it was paid.

"NEW ASSESSMENTS AGAINST DELINQUENTS—LIEN —LIMITATION.] §48. If, from any cause, any city or village should *fail to collect* the *whole* or any portion of *any special assessment which may be levied*, which shall not be canceled or set aside by *the order of any court*, for any public improvement authorized to be made and paid for by special assessment or special tax, the city council or board of trustees may, at *any time within five years after the confirmation of the original assessment, direct* a *new* assessment to be made upon the *delinquent* property for the amount of such *deficiency*, and the interest thereon from the date of such original assessment—which assessment shall be made, as near as may be, in the same manner as is herein prescribed for the first assessment. In all cases where partial payment shall have been made on such former assessment, they shall be credited or allowed on the new assessment to the property for which they were made, so that the assessment shall be equal and impartial in its results. If such new assessment prove insufficient, either in whole or in part, the city council or board of trustees may, at any time *within said period of five years*, order a third, and so on, to be levied in the same manner and for the

same purpose; and it shall constitute no legal objection to such assessment that the property may have changed hands, or been incumbered, subsequent to the date of the original assessment, it being the true intent and meaning of this section to make the cost and expense of all public improvements, to be paid for by special assessment, a charge upon the property assessed therefor, *for the full period of five years, from the confirmation of the* ORIGINAL *assessment*, and for such longer period as may be required to collect, in due course of law, any new assessment ordered within that period.

* * * * *

"EMINENT DOMAIN SUITS—SUPPLEMENTAL PETITION TO ASSESS BENEFITS.] § 53. Whenever any city or village shall apply to any court for the purpose of making just compensation for property taken or damaged by such proceedings as are authorized by this act, such city or village may file in the same proceedings a supplemental petition, praying the court to cause that *an assessment* be made for the purpose of raising the amount necessary to pay the compensation and damages which may be or shall have been awarded for the property taken or damaged, with the costs of the proceeding. The said court shall have power, at any time after such supplemental petition shall have been filed, to appoint three commissioners to make *such assessment* and to ascertain, as near as may be, the costs incurred to the time of such appointment, and the probable further costs of the proceedings, including therein the estimated costs of making and collecting such assessment, and shall direct such costs to be included by such commissioners in making said assess-

ment. *Like proceeding* in making said assessment shall be had, and *the assessment* shall be made, collected and enforced in the same manner, as near as may be, *as is provided in this article in other cases.*"

(Here follows certain provision as to forcing the city to elect to take and pay for property condemned within two years from condemnation judgment, etc.)

## ASSIGNMENT OF ERRORS

*By appellants (plaintiffs in error here) in Illinois Supreme Court.*

Now comes the appellants, Frank J. Willoughby, Louise Specht, Henry E. Sever, Alexander Squair, Edward O. Wood and Harry S. Mccartney, in the above entitled cause, and jointly and severally aver and show to the Supreme Court of Illinois, that in the said and foregoing cause there is *manifest error;* and that the said Circuit Court erred:

* * * * *

6. The said Circuit Court was without jurisdiction in the premises.

7. The said proceeding is and was barred by limitations.

8. The said proceeding was barred by laches of the City of Chicago.

9. The said judgment is against the law.

10. The said judgment is against the evidence.

11. The said judgment is against both the law and the evidence.

12. Said judgment is in other respects void, erroneous and unjust.

13. The said judgment is contrary to "§2" of "Article II" of the Constitution of Illinois, providing that "No person shall be deprived of life, liberty or property without due process of law."

14. The said judgment is contrary to "§13" of "Article II" of the Constitution of Illinois, providing that "Private property shall not be taken or damaged for public use without just compensation."

15. The said judgment is contrary to "§14" of said "Article II," which provides that "Every person ought to obtain by law right and justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay."

16. The said judgment is contrary to "§10" of "Article I" of the Constitution of the United States, providing that "No state shall pass any * * * law impairing the obligation of contracts."

17. The said judgment is contrary to "§1" of the Fourteenth—"XIV"—Amendment to the Constitution of the United States, providing: "Nor shall any state deprive any person of life, liberty or property without due process of law."

18. The said judgment is contrary to the provision in said last quoted section which provides: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

Wherefore these appellants pray that the said judgment of the Circuit Court of Cook County may be reversed.

Louis T. Orr,
Jacob H. Hopkins,
Enoch J. Price,
*For Appellants.*

WARRANTY DEED.

The grantors, BIRDSEY WHITTON and HARRIET E. WHITTON, his wife, of the City of Chicago, in the County of Cook and State of Illinois, for and in consideration of the sum of Sixteen Thousand Six Hundred and Fifty ($16,650.00) Dollars in hand paid, convey and warrant to LOUISE M. SPECHT, of the City of Chicago, County of Cook and State of Illinois, the following described Real Estate, to wit: Lot Three (3) in Edgar M. Snow and Co.'s Subdivision, being a Subdivision of Lot Sixteen (16) and Lot Fifteen (15) (except the East Thirty-seven (37) feet of said Lot Fifteen (15) in Block Two (2) in Yerby's Subdivision of the North half of the North half of the Northwest quarter and the West half of the Northeast quarter of Section Fifteen (15), Township Thirty-eight (38) North, Range Fourteen (14), East of the 3rd Principal Meridian, situated in the City of Chicago, in the County of Cook, in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois.

The grantee assumes and agrees to pay all taxes assessed after the year 1908.

Dated this first day of March, A. D. 1909.

BIRDSEY WHITTON. (Seal.)
HARROT E. WHITTON. (Seal.)

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, Randall W. Burns, a Notary Public in and for said county, in the state aforesaid, do hereby certify that Birdsey Whitton and Harriet E. Whitton, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waived of the right of homestead.

Given under my hand and notarial seal this 11th day of March, A. D. 1909.

RANDALL BURNS,
*Notary Public.*

Randall W. Burns, Notary Public, Cook Co., Ills.

STATE OF ILLINOIS, } ss. No. 4,340,409.
COOK COUNTY. }

Filed for record 1909, Mar. 11, P. M. 12:36, and recorded in Book 10749 of Records, Page 88.

ABEL DAVIS, *Recorder.*

6

Supreme Court, U. S.
FILED
APR 15 1914
JAMES D. MAHER
CLERK

No. 66.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1913.

FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY,

*Plaintiffs in Error,*

*vs.*

CITY OF CHICAGO,

*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

# Brief and Argument for Defendant in Error.

WILLIAM H. SEXTON,
CORPORATION COUNSEL,
PHILIP J. McKENNA,
ATTORNEYS FOR DEFENDANT IN ERROR.

HOWARD F. BISHOP,
OF COUNSEL.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1913.

---

FRANK J. WILLOUGHBY, LOUISE SPECHT, HENRY E. SEVER, ALEXANDER SQUAIR, EDWARD O. WOOD and HARRY S. MECARTNEY,

*Plaintiffs in Error.*

*vs.*

CITY OF CHICAGO,

*Defendant in Error.*

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

## Brief and Argument for Defendant in Error.

## STATEMENT.

MAY IT PLEASE THE COURT:

There is no dispute as to the facts in this case, and while counsel for plaintiffs in error undoubtedly intended to be fair and complete in his statement, he passes over as unimportant certain facts which seem to us of importance, and lays undue emphasis and places an unfair and incorrect construction upon certain minor details of this litigation. The main history of these proceedings has been so ably stated by counsel that we shall refrain from restating any

facts, except such as are necessary to properly supplement and correct the statements of counsel.

In counsel's statement he claims that the plaintiffs in error are making no attempt to get rid of a just tax. We are glad that he takes the position that it is only reasonable and just that the property of plaintiffs in error should pay an assessment for this condemnation as well as other property owners who have been benefited. We disagree, however, with counsel in the conclusion which he draws from the fact that 16 years or more after the improvemnt was completed, the city levied an assessment to pay for this original improvment. We feel that this court should have been told that for 16 years or more there has been a continued effort on the part of the city, which has been met by an equally continuous and stubbornly prolonged resistance, to collect from the property of plaintiffs in error whatever should be found to be the just assessment for benefits conferred. For 16 years or more plaintiffs in error have succeeded in evading any assessment upon their property, and now when an assessment has at last been confirmed against their property by the court of last resort of the State of Illinois, they assert that the courts are exercising leniency toward a public authority. This then is the so-called leniency of the courts towards the City of Chicago, that after a long evasion of this just assessment, the property owners are finally asked to pay what they should have paid many years ago. They have had the benefit of this assessment for years, without paying a cent of interest therefor, and are now complaining because a court which they call lienient to the city,

at last insists that they must pay for benefits long since conferred.

As stated in the case of *City of Chicago* v. *Thomasson, et al.*, 259 Ill. 322:

> "This situation may be partially accounted for by the fact that appellant was all the time contending that his lots in said Snow & Company's subdivision (being the only ones specially benefited which had not been assessed) were not liable for special assessment in this proceeding, and it is possible that for this reason he did not desire to proceed by mandamus."

The only part of this quotation to which we ask the attention of the court is that phrase in parentheses, which is a part of the quotation itself, viz., "being the only ones specially benefited which had not been assessed." The appellant therein referred to, is Harry S. Mecartney, the owner of or party interested in all the lots assessed in the proceeding at bar, and the property referred to in Snow & Company's subdivision is the identical property here before this court. We believe, however, that there is no dispute about this fact, as not only does the Illinois Supreme Court and the record in this case show it to be a fact, but even plaintiffs in error admit that their property is the only property which has not paid any assessment for benefits conferred by the condemnation of land for the widening of South Park avenue.

We feel that we should crave the pardon of this court for going into some of the details of this assessment, inasmuch as we feel that this is an entirely local issue at least as far as details of apportionment, amount of benefits, procedure, etc., are concerned.

Counsel, however, has seen fit to inject into his statement certain extraneous issues, and thereby attempt to bring his case within the jurisdiction of this court, and especially within the sympathies of this court. He has seen fit to dwell somewhat at length upon another phase of the original condemnation case, namely, the payment of the awards. On pages 14 and 15 of his brief on the merits, he has not only gone into this question of awards, but has cited some of the cases which he cited in the Illinois Supreme Court in an entirely different case, to which decision of the Illinois Supreme Court he did not ask a writ of error from this court. We fail to see how the details of the condemnation case are entirely relevant to the issues before this court. If Mecartney or any of the property owners interested felt aggrieved by the decision of the Illinois Supreme Court in the case of *City of Chicago* v. *Thomasson*, their proper course should have been to attempt to bring that case to this court by review. To now attempt to bring that case before the attention of this court, and to [illegible] a that by that case the decisions of Illinois were reversed in favor of the city, seems to us highly improper and unworthy of a reply. Sufficient answer to pages 14 and 15 of counsel's brief on the merits should be, we believe, that if the rights of the plaintiffs in error were prejudiced by the decision in the case of *City of Chicago* v. *Thomasson, supra*, that in the first place there was a proper way to bring to the attention of this court any error in the decision of the Illinois Supreme Court, and in the second place, that case is a decision on certain condemnation awards which have absolutely nothing to do with the assessment at bar. Counsel in his statement

evidently recognizes the elementary principle that special assessment proceedings are state or local matters, but he claims that an exception to that rule exists in this case, because there was no statutory warrant to levy this particular assessment. That there was no statutory warrant, however, is not a question of fact, but a mere conclusion of this counsel. Counsel admits that there was in force, as far as these proceedings were concerned, at the time this assessment was instituted, a certain statute, namely, section 46 of Article 9 of the Cities and Villages Act of 1872, of Illinois, as set out verbatim on page 6 of appendix of counsel's brief on the merits. The Illinois Supreme Court clearly construed this particular section 46 of the statute in such a way as to show that in its opinion this proceeding was instituted under the warrant of that section of the statute. Plaintiffs in error do not agree with said construction placed upon said section 46 of Article 9. They claim that this proceedings is not authorized, according to their construction of section 46, under the provisions of said section 46, and that therefore this proceeding is without any statutory warrant whatever. We believe, however, that the fallacy of the reasoning of plaintiffs in error will be perfectly patent to this court, and that this court will clearly see that this disagreement between plaintiffs in error and the Illinois Supreme Court is entirely a disagreement over the construction of said section 46. The Illinois Supreme Court says that section 46 does apply to this proceeding. Plaintiffs in error say that it does not apply to this proceeding. Plaintiffs in error, however, can not deny that section 46 was in force as far as these proceedings

are concerned at the time they were commenced. They can only deny that it applied to these proceedings. We have, therefore, a dispute over a statutory construction, and in such case we ask this court to follow its well established principle of accepting a conclusion of the state court as to what is a proper construction of its own statutes.

Plaintiffs in error, however, occupy a rather inconsistent position in this, that first they claim that there is no statutory warrant for this proceeding, and then, second, they claim that there is a certain statute, namely, this section 46, but that it has been construed by the settled decisions of the Illinois Supreme Court in such a way as to preclude the Illinois Supreme Court, in the decision here appealed from, to vary or change its former decisions. This certainly seems to us like a frank admission that the whole question is a dispute upon statutory construction, and that this latest ruling of the Illinois Supreme Court upon the construction of section 46 is a reversal of former rulings on the construction of said section 46, and that therefore it is an impairment of the obligation of contract.

In our argument on the merits, we shall attempt to show that this latest ruling of the Illinois Supreme Court was not at variance with, but in harmony with its previous decisions, as far, at least, as the construction of said section 46 was concerned.

In our argument on the jurisdictional question, in answer to the reply of plaintiffs in error on the jurisdictional question, we shall attempt to show that even if this latest ruling of the Illinois Supreme Court had been inconsistent with previous rulings,

or even if it had reversed them, there would be no federal question involved and presented before this court for review.

We are glad to concede and adopt the careful statement of opposing counsel on the theory of the Illinois special assessment system as outlined on pages 4 and 5 of his brief on the merits, but we feel that he unintentionally misleads this court on page 6 when he states that the judgment of the lower court creates a lien which continues for five years from the date thereof, and then goes on to say that therefore plaintiffs in error claim that the judgment here lacks legal authority, and is therefore a deprivation of property, etc. There is no question that under Section 48 of Article 9 of the Cities and Villages Act a confirmation judgment constitutes a lien for only five years. In this connection, however, it should be stated for the convenience of this court that there never has been a confirmation of an assessment against the property here in question, which is exactly the point decided by the Illinois Supreme Court (Printed Rec., 64 and 65) and here denied by plaintiffs in error without argument. In other words, the confirmation judgment of the trial court in this proceeding in 1910 was the first confirmation judgment against this particular land, and so, while Section 48 might have had some application if there had been a previous judgment against this land, it had no application in view of the fact that there never had been any previous judgment against the land. In fact, opposing counsel has made this point clear by his statement on page 9, in which he says that finally there was a regular judg-

ment of the court on July 2, 1898, and the assessment roll was confirmed *with the exception of the property in question in this record.* This judgment of the lower court denying confirmation to the property in question was reversed by the decision of the Illinois Supreme Court in *City* v. *Mecartney,* 216 Ill. 377. If the remanding order of the Illinois Supreme Court had been filed within the prescribed period of two years, there would have been a confirmation against the property in question. The remanding order, however, was not filed. Consequently the case was abandoned, and by the decisions of Illinois, this amounted to no confirmation, or rather there never *was* any confirmation, merely the opportunity (which was not availed of) to have obtained a confirmation. (Printed Rec., bottom page 63 and page 64.)

Again we fail to see the materiality of re-stating, as they are re-stated on page 10 of counsel's brief, various previous attempts to assess this property. They all failed, and have nothing to do with the assessment in question unless to show the repeated efforts, which were hitherto successful, on the part of plaintiffs in error or their predecessor in interest to evade the collection of a special assessment on their property now before this court. Likewise, we see no reasonable object in bringing to the attention of this court on page 12 the figures of certain previous assessments attempted to be levied upon this property, unless it be to stir the sympathies of this Honorable Court. We certainly are not concerned here with former proceedings which were not confirmed. They would not even be competent evidence

before a jury on the question of the correctness of this assessment.

As long, however, as plaintiffs in error have seen fit to drag in a certain ethical feature to this question, we believe that it is not improper to state to this court that plaintiffs in error or their predecessor in title expressly consented (opposing counsel's Brief on Merits, 8) to allow the city to take possession of certain property, knowing that it had to be paid for by special assessment, and then objected because the special assessment turned out to be higher than that contemplated or desired by plaintiffs in error or their predecessors in title. As a matter of fact, it will not be difficult for the court to see from a glance at page 16 of the printed record in this case that one, Harry S. Mecartney, is the real party in interest in this case. He owned all of the land assessed in this proceeding. He sold it out to certain purchasers, and not only gave his warranty deed which is the customary way of transferring property, but gave heavy bonds to the Chicago Title & Trust Company to secure the purchasers against assessments on account of the condemnation proceeding. Assuming that a case is presented before this court under the contract clause of the federal constitution, we find out that these purchasers of the lots here in question, who purchased the same in 1901, as stated on page 12 of counsel's brief, purchased the same with complete notice and only after having been indemnified against the payment of assessments by Harry S. Mecartney. There is no question but what they knew that the street had been widened. There

is no question but what they knew that it was quite possible that eventually an assessment would be confirmed for such widening. The vendor of the property, Harry S. Mecartney, evidently knew of these facts, since he had owned the property previous to the institution of the original condemnation proceedings. (Printed Rec., 16.) He speculated on the chance that no assessment would ever be confirmed against this property, and (as stated by the Illinois Supreme Court in the *City of Chicago* v. *Thomasson* case, 259 Ill. 322) that this would be the only property specially benefited which would not pay any assessment, and therefore he guaranteed to his purchasers that they would not have to pay any assessment. If the assessment now confirmed is eventually paid, whether Harry S. Mecartney pays for it in the way of indemnity to his purchasers, or the purchasers themselves pay for it, there is no question but that he, as vendor, went into the transaction with his eyes open, and the plaintiffs in error, as purchasers, went into the transaction with their eyes open and fully aware that there was a strong possibility, if not probability, of an assessment. If he or they eventually pay what they hoped they would not have to pay, we fail to see where there is any impairment of the obligation of contract. We feel that this court will see that this so-called impairment of the obligation of a contract is really a mask to hide a clever and hitherto successful attempt to evade a just assessment and an assessment paid by all other property owners assessed in this proceeding.

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Opposing counsel on the bottom of page 12 of his brief on the merits refers to certain proceedings in 1901, in which objections to the confirmation of this assessment were sustained, and then in referring to the decision of the Illinois Supreme Court, in the case of *City* v. *Mecartney*, 216 Ill. 377, he states that, inasmuch as the city never filed any bill of exceptions, it evidently was satisfied with the trial of the original case. We cannot see how any such inference is warranted, and we feel constrained to state that such an assumption is unfair and unjust. According to the Illinois practice, the city could have taken this adverse decision up to the Supreme Court, either by way of appeal with the bill of exceptions, or on writ of error, without a bill of exceptions. That it chose the latter course is purely a matter of discretion and expediency, which counsel must know. In this connection counsel criticizes the decision of the Illinois Supreme Court in this case, because it reversed a decision of the lower court without a bill of exceptions. To inject into this appeal such minor matters of purely local practice on a totally irrelevant matter seems unfair to this court and we should refrain from even discussing this paragraph if it were not for counsel's contention that this decision constituted the first reversal of prior settled rulings by the Illinois Supreme Court in this litigation. Out of an abundant caution lest our silence may seem to be an admission of this contention, we refer this court to the following quotation from this case of *City* v. *Mecartney*, 216 Ill. 377:

> "The court will not inquire into the sufficiency of the evidence to support a finding, unless there is an exception preserved in the bill of excep-

> tions. * * * But no bill of exceptions is necessary where the errors appear in the record and judgment of the court. *Kitchell* v. *Burgwin*, 21 Ill. 40; *Van Dusen* v. *Pomeroy*, 24 Ill. 289; *Wiggins Ferry Company* v. *People*, 101 Ill. 446; *McChesney* v. *City of Chicago*, 115 Ill. 307."

The court further on, at page 381, in this case states:

> "If the jury in a condemnation proceeding award damages for property not taken the judgment is conclusive against a subsequent proceeding to assess it for benefits, because the judgment is conclusive that there are damages and not benefits. But where a jury simply finds that there are no damages, the verdict and judgment are not and cannot be conclusive that there are no benefits. The fact that property is greatly benefited and doubled in value by an improvement is not inconsistent with the verdict that it is not damaged, but perfectly consistent with it. It would seem to be an absurdity to say that the finding of a jury that the property of defendant in error was not damaged is also a finding that it was not benefited, a question which the jury could not legally consider."

In other words, the court decided two things in this case. First, that it had the jurisdiction to review because the error was apparent on the face of the record and did not need to be preserved in a bill of exceptions; and, second, that the verdict of the jury in the original condemnation proceeding, that the property in question was not damaged, did not necessarily mean that it was not benefited. *This then is the so-called first reversal of prior settled rulings by the Illinois Supreme Court,* a decision backed by abundant local precedent to the effect that

the reviewing court had jurisdiction to review this particular case.

———0———

At the bottom of page 13, counsel again refers to the failure on the part of the city to file the remanding order in the case of *City of Chicago* v. *Mecartney*, which reversed the decision of the trial court in sustaining objections to the assessment. According to his own statement, this had the effect of ending the proceedings as to said objections. In other words, here is another admission by counsel of our own contention, that there was no confirmation of any assessment on the property here involved. Then comes counsel's statement, supported by reference to certain condemnation cases, that the case of *City of Chicago* v. *Thomasson*, 259 Ill. 322, above referred to, for a second time reversed the decisions of Illinois in favor of the city. As previously stated, this case on the condemnation issues seems so clearly irrelevant to the case at bar, that even if it did constitute a reversal of previous decisions (which we believe an even cursory examination of the case will show is not the situation), and even if this court assumed jurisdiction to review decisions of state courts in the case of their reversal of their rulings, it is so far removed from having any direct bearing upon the case at bar, that we refrain from further discussion of it. It did not decide a single issue now before this court. As we understand that case, it has no value here to be cited as analogous to any of the issues here involved.

We now come to the statement on page 17 of opposing counsel's brief, that the decisions of Illinois

have been reversed a third time in favor of the city. Here we are referred to the decision of the Supreme Court in this particular case, and at last we arrive at some decision which, if it is a reversal of prior rulings, is entitled to be at least considered here. On this proposition counsel states on page 18 of his brief, that on July 2, 1898, there was a confirmation of the original assessment roll, as an entirety, and that therefore, all possible supplemental proceedings under the Illinois statute for the assessment of this property were absolutely barred five years after the date of such confirmation of the entire roll. Counsel's own statement is answered, however, on the very next page (19) at the bottom of the page, in which he shows that, in the final judgment of July 2, 1898, overruling objections to the assessment roll, the objections to sub-lots 1 to 8, Snow & Company's subdivision, being the property involved here, were sustained, and that there was no confirmation as to such property. This clearly negatives the statement on the preceding page that there was a confirmation of the entire roll, and shows that as to the only property which is here being considered, and the only property involved in this proceeding, there never has been any special assessment confirmation until the one now before this court.

We shall now attempt to divide our brief into two parts, one on the jurisdictional question, and the other on the merits of this case. As we have already rather briefly outlined the jurisdictional question in our original brief, upon the motion to dismiss for want of jurisdiction, we ask the indulgence of this court to be allowed to present our reply brief on the merits first, and then conclude with certain addi-

tional suggestions on the jurisdictional question. We believe that the argument of the question on the merits will clarify the application of the jurisdictional question to the facts in issue and as they were presented in the Illinois Supreme Court.

On the merits, therefore, we shall admit first that special assessments cannot be levied without a statutory warrant, but contend that there is a sufficient statutory warrant for this special assessment; second, we shall attempt to show that the construction placed upon Section 46 of Article 9 of the Cities and Villages Act of 1872 by the Supreme Court of Illinois, in its decision in this case, was neither erroneous nor in conflict with previous decisions of that court, and that therefore there was not a long line of uniform and settled rulings of the Supreme Court of Illinois inconsistent with the ruling in this case.

In support of the second contention we shall endeavor to amplify and support the statement already made that there has never been any confirmation of any assessment against the property here in question. In further support thereof, we shall refer to the Illinois decisions holding that a judgment of confirmation is a several judgment, and operates separately against each tract and parcel of land; and that therefore, the confirmation of the rest of the assessment roll did not in any way affect or act as a confirmation of the assessment against the property in question before this court.

On the jurisdictional question, we shall endeavor to prove first, as a matter of procedure, that no Federal question was properly preserved for review in this court; second, that no Federal question is here

presented on the ground of a deprivation of property without due process of law, or confiscation of property, and, third, no Federal question is presented for review on the ground of the violation of the contract clause of the Federal Constitution.

# REPLY BRIEF ON THE MERITS.

## I.

THERE IS STATUTORY WARRANT FOR THIS PROCEEDING.

*Chicago* v. *Race*, 256 Ill. 209.

Section 46, Art. IX, Cities and Villages Act; of Illinois of 1872.

## II.

THE DECISION OF THE SUPREME COURT OF ILLINOIS IN THIS CASE WAS NOT ERRONEOUS, BUT WAS CORRECT. IT IS SETTLED LAW THAT IN A PROCEEDING SUCH AS THIS, SECTION 46 OF ARTICLE IX OF THE CITIES AND VILLAGES ACT OF 1872 OF ILLINOIS APPLIES. THE DECISION OF THE ILLINOIS SRPREME COURT IN THIS CASE IS NOT IN CONFLICT WITH PRIOR DECISIONS.

*McChesney* v. *Chicago*, 161 Ill. 110.

*People* v. *McWethy*, 165 Ill. 222.

*Le Moyne* v. *Chicago*, 175 Ill. 356.

*Rich* v. *Chicago*, 187 Ill. 396.

*City* v. *Nichols*, 192 Ill. 489.

*Doremus* v. *Chicago*, 212 Ill. 513.

*Holden* v. *Chicago*, *Id.* 289.

*Chicago* v. *Hulbert*, 205 Ill. 346, 357.

*Chicago* v. *Nodeck*, 202 Ill. 257, 266.

*Noonan* v. *Chicago*, 231 Ill. 588, 591.

*Chicago* v. *Race*, 256 Ill. 209 (1912).

*Phila. & Reading Coal Co.* v. *Chicago*, 158 Ill. 9.

*Pardridge* v. *Village of Hyde Park*, 131 Ill. 537.

*Murray* v. *City of Chicago*, 175 Ill. 340.

*Freeport St. Ry. Co., et al.*, v. *Freeport*, 151 Ill. 451.

*City of Chicago* v. *Mecartney*, 216 Ill. 377.

*City of Chicago* v. *Thomasson*, 259 Ill. 322.

(a) THERE NEVER HAS BEEN ANY JUDGMENT OF CONFIRMATION AGAINST THE LAND IN QUESTION IN THIS PROCEEDING, AND THEREFORE, SECTION 48 OF ARTICLE IX OF THE CITIES AND VILLAGES ACT OF 1872 DOES NOT APPLY. A CONDEMNATION JUDGMENT OR AN ASSESSMENT JUDGMENT IS A SEVERAL JUDGMENT AGAINST EACH TRACT OR PARCEL OF LAND.

*Kelly* v. *City of Chicago*, 148 Ill. 90, 95.

*Phelps* v. *City of Mattoon*, 177 Ill. 169, 171.

*City of Taylorville* v. *Johnson*, 242 Ill. 175, 177.

*Gibler* v. *City of Mattoon*, 167 Ill. 18, 20.

*Jones, et al.* v. *Town of Lakeview*, 151 Ill. 663, 680.

*Sumner* v. *Village of Milford*, 214 Ill. 338, 391.

*City of Chicago* v. *Nodeck*, 202 Ill. 257.

*Phila. & Reading C. & S. Co.* v. *Chicago*, 158 Ill. 9.

*Hutt* v. *Chicago*, 132 Ill. 352.

*City of Chicago* v. *Mecartney*, 216 Ill. 377.

(b) THE CONSTRUCTION OF SECTION 48 OF SAID ARTICLE IX.

*City of Taylorville* v. *Johnson*, 242 Ill. 175.

(c) THE CONSTRUCTION OF SECTION 53 OF SAID ARTICLE IX.

*Pearson* v. *City of Chicago*, 162 Ill. 383, 385, 386.

*Guild* v. *City of Chicago*, 82 Ill. 472.

## REPLY BRIEF ON THE JURISDICTIONAL QUESTIONS.

### I.

AS A MATTER OF PROCEDURE, NO FEDERAL QUESTION IS PROPERLY PRESENTED TO THIS COURT FOR REVIEW, INASMUCH AS NO FEDERAL QUESTION WAS DECIDED BY THE ILLINOIS SUPREME COURT, NOR COULD HAVE BEEN DECIDED BY THE ILLINOIS SUPREME COURT, AS IT WAS NOT PROPERLY PRESENTED BEFORE THAT COURT IN ACCORDANCE WITH THE ILLINOIS PRACTICE.

*Hulbert* v. *City of Chicago*, 202 U. S. 275.

*Keyes* v. *Kimmel*, 186 Ill. 109, 114.

*Erie R. R. Co.* v. *Perdy*, 185 U. S. 148.

*Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648.

*Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238.

*Chapin* v. *Fye*, 179 U. S. 127.

*Kelly* v. *City of Chicago*, 148 Ill. 90.

*Watts* v. *Village of River Forrest*, 237 Ill. 231.

*Close* v. *City of Chicago*, 217 Ill. 216.

*Clark* v. *City of Chicago*, 214 Ill. 318.

*South Chicago City Ry. Co.* v. *City of Chicago*, 196 Ill. 490.

(a) THIS CASE WAS DECIDED ON GROUNDS NOT INVOLVING ANY FEDERAL QUESTIONS.

*Beatty* v. *Benton*, 135 U. S. 244.

*Marrow* v. *Brinkley*, 129 U. S. 178.

*Hale* v. *Akers*, 132 U. S. 554.

*San Francisco* v. *Itsell*, 133 U. S. 65.

*Hopkins* v. *McClure*, 133 U. S. 380.

*Kennebeck and P. R. Co.* v. *Portland & K. R. Co.*, 14 Wall. 142.

*Gibson* v. *Chouteau*, 8 Wall. 314.

*Klinger* v. *Mo.*, 13 Wall. 357.

*Detroit City R. R. Co.* v. *Guthard*, 114 U. S. 143.

(b) NO FEDERAL QUESTION WAS NECESSARY TO THE DETERMINATION OF THIS CASE.

*Moore* v. *Miss.*, 21 Wall. 638.

*Bowling* v. *Lersner*, 91 U. S. 94.

*Brown* v. *Atwell*, 92 U. S. 327.

*Citizens Bank* v. *Louisiana Board of Liquidation*, 98 U. S. 140.

## II.

NO FEDERAL QUESTION IS HERE PRESENTED ON THE THEORY THAT THE PROVISION OF THE FOURTEENTH AMENDMENT FORBIDDING THE DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW HAS BEEN VIOLATED. THERE HAS BEEN A FULL AND COMPLETE HEARING IN THE REGULAR COURSE OF JUDICIAL PROCEEDINGS.

*Norwood* v. *Baker*, 172 U. S. 269.

*Davidson* v. *Board of Administrators of New Orleans*, 96 U. S. 97.

(a) THE DECISION OF A STATE COURT IS CONCLUSIVE UPON QUESTIONS OF FACT.

*Baldwin* v. *Kansas*, 129 U. S. 52.

*C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226.

*Thayer* v. *Spratt*, 189 U. S. 346.

*Avery* v. *Potter*, 179 U. S. 305.

*Eastern Bldg. & Loan Ass'n.* v. *Ebaugh*, 185 U. S. 120.

*Lent* v. *Tillison*, 140 U. S. 316.

*Corry* v. *Campbell*, 154 U. S. 629.

*Kelly* v. *Pittsburgh*, 104 U. S. 78.

*Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S. 480.

State Railroad cases, 92 U. S. 575.

*Davidson* v. *New Orleans*, 96 U. S. 97.

*Kirtland* v. *Hotchkiss*, 100 U. S. 191.

*Missouri* v. *Lewis*, 100 U. S. 22.

*German Nat. Bank* v. *Kimball*, 103 U. S. 732.

*Spencer* v. *Merchant*, 125 U. S. 345.

(b) THIS COURT WILL FOLLOW THE INTERPRETATION PLACED UPON THE STATE STATUTE BY THE SUPREME COURT OF THAT STATE.

*Aicardi* v. *Alabama*, 19 Wall. 635.

*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28.

*Morley* v. *Lake Shore & M. S. P. R. Co.*, 147 U. S. 162.

*Fairfield* v. *Gallatin Co.*, 100 U. S. 47.

*Congdon* v. *Goodman*, 2 Black. 574.

*Grand Gulf R. & Bkg. Co.* v. *Marshall*, 12 How. 166.

*Adams* v. *Preston*, 22 How. 423.

*Scott* v. *Jones*, 5 How. 243.

*Smith* v. *Adsit*, 16 Wall. 185.

*Klinger* v. *Missouri*, 13 Wall. 257.

*Nichols* v. *Levy*, 5 Wall. 433.

*Murray* v. *Gibson*, 15 How. 421.

*Citizens Bank* v. *Louisiana Board of Liquidation*, 98 U. S. 140.

## III.

NO QUESTION IS PRESENTED FOR REVIEW ON THE GROUND THAT THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION HAS BEEN VIOLATED.

*Seattle* v. *Kelleher*, 195 U. S. 351.

Cooley on Taxation, 3d Ed. 527, 528.

*Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 532.

*Muhlker* v. *Railroad*, 197 U. S. 544.

*Ross* v. *Oregon*, 227 U. S. 150.

*Central Land Co.* v. *Laidley*, 159 U. S. 103.

(a) A CHANGE OF VIEW BY THE STATE COURT DOES NOT RAISE A FEDERAL QUESTION UNDER THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION.

*Mobile Transp. Co.* v. *City of Mobile*, 187 U. S. 488.

*Nat. Mutual Bldg. & Loan Ass'n.* v. *Brahan*, 193 U. S. 635, 647.

*Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 How. 317.

## ARGUMENT ON THE MERITS.

### Introductory Statement.

Opposing counsel in his brief for plaintiffs in error in opposition to the motion to dismiss, has stated that he agrees with the propositions of law as stated in the brief of defendant in error on the motion to dismiss, but that he differs with us in the application of these principles.

Chief among those principles are the following:

First, special assessment matters are local matters.

Second, special assessment proceedings are reviewed in this court only in exceptional cases.

Third, a mere change of view by the State Court does not raise a Federal question under the contract clause of the United States Constitution.

Then counsel proceeds to claim that this is one of those exceptional cases in which this court should interfere.

Counsel's argument is based upon the proposition that the assessment before this court is without any legislative authority, but that it is a special assessment spread by "mere court fiat." We shall endeavor to show, however, that the special assessment before this court was levied by the City of Chicago under express statutory power, and that what opposing counsel calls "a court flat" was merely the construction of this legislative power. In other words, there were certain sections of Article 9 of the Cities

and Villages Act of 1872 of the State of Illinois, under warrant of which this assessment could be levied. Counsel contends, and the city agrees with him in this contention, that under certain provisions of this Article 9, viz: Sections 47 and 48, it would not have been possible to levy this assessment. The city, however, contended, and this contention was supported by the Illinois Supreme Court, that this assessment was not levied under those sections, but under Section 46 of Article 9. (Printed Rec., pp. 64 and 65.) Counsel, however, keeps on insisting that this assessment has been brought under Section 48, and, as it is impossible to bring this assessment within the provisions of said Section 48; that therefore, the whole proceeding is without any statutory authority whatever and is merely an assessment by order of court. Such a line of reasoning is clearly unfair, as this court will discover from an examination of the cases cited by counsel in support of this proposition.

Counsel continues to contend that this proceeding is barred by a clearly worded limitation statute of the state. In making this statement counsel is referring to Section 48, by the terms of which, we agree, it is impossible to support this assessment.

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The second main proposition of opposing counsel is based upon the theory that the State Supreme Court had given a settled construction to the local statutes, by which it would have been impossible to levy this new assessment.

Counsel further contends that those purchasing property on the faith of this settled construction, by which they would be justified in believing that there

was no possibility of this land being assessed for an improvement that was already in, were deprived of property without due process of law, and that their contract of purchase was impaired when they later discovered it was necessary to pay for the improvement.

As stated in the *City of Seattle* v. *Kelleher*, 195 U. S. 351:

> "In this case the road was cut through the plaintiff's land and, if he had looked, was visible upon the ground. Whether it had been paid for was for him to inquire. The history of what had happened would have suggested that it was not improbable that sooner or later a payment must be made."

Applying the reasoning of the above case to the case at bar, there was no reason why any one purchasing the property in question should suspect that all the rest of the land within a mile of this improvement for widening South Park Avenue should pay an assessment for the benefits of the widening, and that this property alone, which was primarily benefited, should escape. An examination of the abstract to the property before purchase or sale would certainly have revealed the fact, if ordinary observation did not reveal it;—that South Park Avenue had been widened and that property in the immediate vicinity had been assessed to pay for it. It therefore would seem that plaintiffs in error come before this court with very poor grace in alleging that they have been deceived by the construction which the Illinois Supreme Court placed upon Section 46 of the Local Improvement Act, and in alleging that they should be righteously indignant because the Supreme Court of

Illinois had decided that their lands are liable for an assessment equally with other lands benefited by the improvement.

## I.

### THERE IS STATUTORY WARRANT FOR THIS ASSESSMENT PROCEEDING.

Turning now to the brief of opposing counsel, we find as his first proposition that elementary principle of law which states that *special assessments are statutory proceedings and cannot be levied without a statutory warrant.*

In support of this statement, the case of *Chicago* v. *Race*, 256 Ill. 209, is cited. A brief examination of this case will convince this court that it is really in support of the proposition here contended for by the city. This case is similar to the case at bar, inasmuch as it likewise was a proceeding for a new special assessment under Section 46 of Article 9 of the Cities and Villages Act of 1872 of the State of Illinois (Revised Statutes 1874, page 239), to pay for the balance of an improvement which had been constructed some 20 years previous. Exactly the same contentions were raised by counsel for the defendant in the Race case as are raised by opposing counsel in the case at bar.

It was there contended that:

> "A new assessment of property which, for any reason, has escaped its just share of an improvement, cannot be made unless specially provided for by a valid statute. (Page & Jones on Taxation and Assessments, Section 958.)"

It appeared that in this case objections raised to

the assessment had been sustained in the original assessment proceeding on the ground that the court had no jurisdiction. Applying those facts, the Supreme Court of Illinois said in the Race case, page 212:

> "Under all the authorities, before a new assessment for completed work can be sustained, the original assessment must have been invalid, and its invalidity established either by the action of the City Council or by the judgment of some court. (Page & Jones on Taxation and Assessments, Section 960.) The statute does not make any distinction between proceedings that are invalid because of some mere error or irregularity, and those which are invalid because the court has no jurisdiction, and we find no such distinction as appellants insist upon recognized in the decisions of this court. Appellants contend that the original proceeding was not set aside by the judgment of 1892 refusing the application for judgment and order of sale. The objections to the rendition of judgment were sustained and judgment refused because the court had no jurisdiction to confirm the assessment by reason of the defective notice. *This was, in effect, an adjudication that the judgment of confirmation was null and void, and had the effect of setting it aside.*" (Italics ours.)

Applying the reasoning of this case to the case at bar, it will be seen that in the case at bar there is, first, a new assessment levied after the improvement has been completed; second, the new assessment is levied under Section 46 of Article 9, which allows a new assessment to be levied whenever the original assessment shall be annulled by the City Council or Board of Trustees, or set aside by any court; third, this assessment, as in the Race case, **was not set aside in so many words by the**

**court, but was dismissed as to this property, which was held to be equivalent to a setting aside of the assessment, and therefore brought the case squarely within the provisions of said Section 46 of Article 9.**

At any rate, putting the most favorable interpretation upon counsel's argument that can possibly be placed upon it, the only contention that counsel could make would be that the Illinois Supreme Court erroneously construed that the action of the trial court in dismissing the assessment was equivalent to setting it aside. Assuming for the sake of argument, that the Illinois Supreme Court erred in this construction of its own statute, we do not believe that opposing counsel would argue before this tribunal that an improper construction of a state statute is ground for interference by this court.

Counsel certainly is not warranted in contending that there was no statutory authority for the levy of this assessment, for at most he could only contend that Section 46 had not been properly applied by the state courts to the facts before those courts.

We shall, however, further endeavor to show that:

## II.

### The Construction of This Section 46 by the Illinois Supreme Court Was Neither Erroneous Nor in Conflict with Previous Decisions of That Court.

Turning now to an analysis of the cases cited under Chapter 3 of opposing counsel's argument, we find that he contends that if this assessment be

considered as a new or re-assessment under Section 46, the same could not be levied after the confirmation judgment of July 2, 1898.

In the first place, we hope this honorable court will pardon us if we again bring to its attention the fact that this so-called confirmation judgment of July 2, 1898, was not a confirmation of the particular property before this court, but was a confirmation of other property in the roll. On this proposition, a fundamental principle of special assessment law, which is entirely ignored by opposing counsel, should be kept in mind, namely, that:—

*a.*

THE JUDGMENT OF CONFIRMATION IS A SEVERAL JUDGMENT AND OPERATES SEPARATELY AGAINST EACH TRACT AND PARCEL OF LAND, AND THAT A REVERSAL UPON APPEAL OR WRIT OF ERROR AFFECTS ONLY THE LAND INCLUDED IN SUCH APPEAL OR WRIT OF ERROR.

Section 34, Article 9, Cities and Villages Act of 1872 of Illinois, as amended (Starr & Curtis' Annotated Statutes, Volume 1), has this provision:

> "The judgment of the court shall have the effect of a several judgment, as to each tract or parcel of land assessed, and any appeal from such judgment or writ of error shall not invalidate or delay the judgment, except as to the property concerning which the appeal or writ of error is taken. Such judgment shall be a lien upon the property assessed from the date thereof until payment shall be made."

In the case of *Kelly* v. *City of Chicago*, 148 Ill. 90, the court said at page 95:

> "Plaintiffs in error were not parties to that

> appeal, nor was the judgment of confirmation as to them in any wise affected by the judgment of this court reversing the judgment against the property of the appellants in that case. The judgment is, in effect, several as to the property owners, and one or more may appeal or prosecute a writ of error without affecting the judgment against the others."

It appears that in the Kelly case the Illinois court affirmed a judgment against lands of appellants, although appellants claimed that the reversal of the Edwards' judgment for the same improvement vacated the judgment against their property, which theory was held to be erroneous, as their land was not included in the Edwards' appeal.

In *Phelps* v. *City of Mattoon,* 177 Ill. 169, the court says on page 171:

> "A judgment of this kind is several as to each tract or parcel of land in the assessment roll, and in the former case there was nothing in the record to show that ten of the plaintiffs in error had any interest in any tract against which judgment was rendered, or that they were parties to the proceeding or injured by the judgment. As to the others, it did not appear as to what property the writ of error was taken or as to what tract or tracts a reversal was asked. The record did not disclose a cause of action, and the judgment was affirmed for that reason. That judgment of affirmance, therefore, did not affect the particular tracts of land now involved in the record."

This proposition, that the judgment of confirmation of a special assessment is a several judgment against each tract, is supported by the following cases:

> *City of Taylorville* v. *Johnson,* 242 Ill. 175, 177.

*Gibler* v. *City of Mattoon,* 167 Ill. 18, 20.
*Jones et al.* v. *Town of Lakeview,* 151 Ill. 663, 680.

On this question, the court, in *Sumner* v. *Village of Milford,* 214 Ill. 338, at page 391, says:

> "The argument that the reversal of the judgment as to the tract owned by Gilbert Vennum operated to set aside the taxes as to the property of the complainants, is met by several decisions of this court. (*Kelly* v. *City of Chicago,* 148 Ill. 90; *Phelps* v *City of Mattoon,* 177 Ill. 169; *City of Chicago* v. *Nodeck,* 202 Ill. 257.)
>
> The reversal as to Vennum's property had no effect as to any other piece of property and indeed Section 56 of the Local Improvement Act so expressly provides. (Laws of 1897, page 121.)"

The second paragraph of Section 56 of the Local Improvement Act of 1897, which superseded Article 9 of the Cities and Villages Act of 1872, is analogous to and identical in the language hereinbelow quoted with Section 34 of Article 9 (which said Article 9 governed all proceedings relating to this assessment at bar, inasmuch as the original proceedings had been started when Article 9 was still in force), said Section 34 being as follows:

> "* * * Such judgments shall have the effect of several judgments as to each tract or parcel of land assessed, and no appeal from any such judgment or writ of error shall invalidate or delay the judgments, except as to the property concerning which the appeal or writ of error is taken."

If opposing counsel had kept this section and the above cases in mind, he would not have fallen into the error found on page 24 of his brief, in opposi-

tion to the motion to dismiss, in which he attempts to distinguish the case of *Philadelphia & Reading C. & S. Co.* v. *Chicago,* 158 Ill. 9, from the case at bar on the ground that in the Philadelphia & Reading case the first assessment was set aside for inherent error in the whole proceeding, while in this case, confirmation was only denied as to part of the property in the assessment roll, viz., that property now before this court. Our contention is that the Philadelphia & Reading Coal Company case is on all fours with this case, being a sequel to the case of *Hutt* v. *City of Chicago,* 132 Ill. 352.

An attempt was made in the Hutt case to extend Canal street in the City of Chicago. No provision was made by ordinance or otherwise for the construction of a bridge across the South Branch of the Chicago River connecting parts of the proposed street. This court held that the property which appealed was not benefited by the proposed improvement and reversed the judgment. An appropriation for a bridge was thereafter made, and a new ordinance was passed under said Section 46 of Article 9 of said Cities and Villages Act, annulling the old proceeding and ordering that a new petition be filed so that the improvement could be made. New proceedings were thereupon instituted. This last proceeding is the Philadelphia & Reading case, *supra.*

The appellants in that case made the same objections which plaintiffs in error make here, namely, that the right of the city to make a new improvement was exhausted by the failure to file a remanding order within two years after reversal, and that

therefore an assessment could not be levied against their lands.

Construing Section 46 of said Article 9, the court, at page 16 in the Philadelphia & Reading case, *supra*, held:

> "This section makes provision for the annulment of an assessment by the City Council or Village Board of Trustees. There may be contingencies in which such an act is eminently and unquestionably advisable and proper."

On page 17 the court says:

> "This section, in substance, provides that if any assessment is annulled by the City Council or set aside by any court, a new assessment may be made and returned under the general provisions in regard to special assessments, and just as if no prior assessment had ever been made. The section has no reference to a deficiency assessment, for special provision is made for that in Section 47; and it has no reference to a new assessment against delinquents, for special provision is made for that in Section 48."

Counsel attempts to distinguish this case by saying the reversal of the judgment in the Hutt case invalidated the entire assessment proceeding, and therefore, it was proper, under Section 46 of Article 9, for the City Council to annul the entire proceeding and provide for a new assessment. In this respect we believe counsel are in error. The Hutt case did not invalidate the entire proceeding, but affected only the appellants in that case.

It appears from the opinion in the Hutt case that the assessment for public benefits amounted to $9,-165.81, and the private benefits amounted to $174,-150.37, making a total of $183,316.18. Property

owners representing property assessed at the sum of $50,000 appeared and objected, but confirmation was rendered against the entire assessment roll as filed, which said assessment was reversed as to the property that appealed therefrom. It would appear therefore that the difference equals $133,316.18, which was the amount of the original confirmation which was not reversed.

The exact amount of the assessment against the land of the Lehigh Valley Coal Company does not appear from that opinion, although it does show the assessment against the Philadelphia & Reading Coal Company. However, such assessments were insignificant in comparison with the entire assessment for that improvement.

And yet counsel contends on page 24 of his brief that the first assessment was set aside for "inherent error in the whole proceeding." If counsel's statement is correct, then that case is authority for the view that the annulling ordinance and order of court entered thereon vacated the entire assessment in the Hutt case, amounting to $183,316.18.

This, however, is not the law and is not supported by the Philadelphia & Reading case. That case is authority only for the rule that an assessment can be annulled against *all property against which there has been rendered no valid judgment of confirmation.* The judgment rendered against the Lehigh Valley Coal Company was reversed in the Hutt case and no remanding order having been filed within the prescribed two years in the Superior Court, such failure automatically annulled the old assessment proceeding against it; and, there being no judgment

of confirmation, the City of Chicago very properly acted under said Section 46 of said Article 9.

It is true that the assessment against the property owned by the Philadelphia & Reading Coal Company was raised from $2,500 to $3,150, an increase of $650, but said assessment for $2,500 having been paid, the court did not consider that this was a vacation of the judgment originally entered against this company, but simply an increase of benefits against the land. The court said, at page 16:

> "The city claims that the new supplemental petition, and the assessment based thereon, are a proceeding *de novo*, in which the commissioners acted with reference to the original supplemental petition and first assessment. It concedes, however, that the $2,500 paid must be applied on the new assessment to the credit of the particular property for which it was paid, and that the property will only have to pay the difference of $650."

The judgment of confirmation being a several judgment against each tract and parcel of land, it follows, therefore, that the reversal in the Hutt case could not in any way have affected the property not joining in that appeal; and as the judgment against lands not appealing was in full force and effect, the ordinance and order of court in the Reading case could not have affected that judgment.

On the authority of the McChesney, McWethy and Doremus cases (cited by opposing counsel in Chapter III of his brief), this judgment could not have been vacated. It follows that the Philadelphia & Reading case is not authority for the theory that the entire assessment against the property confirmed in the Hutt case was vacated.

We beg the pardon of this honorable court for having dwelt so long upon this Reading case, but inasmuch as it was decided some considerable time previous to the decision in the case at bar, namely, on October 11, 1895, 15 years before the decision in this case, and six years before this land was sold by Harry S. Mecartney to plaintiffs in error, we believe that it is a complete answer to the claim of opposing counsel that the Illinois Supreme Court has changed its construction of settled rules of law. This case lays down the same rule of law which was in force before plaintiffs in error bought this property now before this court and involved in this assessment proceeding.

The Philadelphia & Reading case is very similar to the case at bar, the only difference being that in the Hutt case (the first appeal in the Philadelphia & Reading case) the judgment favored the city, which said judgment was reversed, while in the case at bar the judgment was against the city, which judgment, in turn, was reversed in the Mecartney case, 216 Ill. 377.

In both cases, however, no remanding order was filed within two years after the reversal of the judgments. The particular proceedings stood abandoned, and new proceedings were authorized by said Section 46 of Article 9. By the failure to file the remanding order in the Mecartney case (216 Ill. 377), the city lost the benefit of its victory, and it became necessary to commence new proceedings in order to raise sufficient money to pay the condemnation awards, but the failure to file the mandate in each case did not destroy the cause of action. In both the

Reading case and the case at bar, however, it appears that there was a valid judgment of confirmation as to a majority of the property, but that as to certain other property there was never a judgment of confirmation. In the case at bar there could have been such a judgment of confirmation if the remanding order in the Mecartney case, *supra*, had been filed. The mere fact, however, that such *judgment of confirmation could have been obtained* by the filing of the remanding order does not take away the fact that *the remanding order was not filed, and that therefore no such judgment of confirmation was obtained.*

It will therefore be seen that in both of these cases the total assessment was not set aside, but only the assessment as to particular property, and that was set aside by the failure of the city to secure a judgment of confirmation. As to property against which a valid judgment of confirmation was obtained, opposing counsel would be right in his contention that the judgment could not be set aside after the term of court had gone by.

As shown in the Extracts from Transcript of Record, pages 63 and 65, the old assessment proceedings for the assessment of benefits against sub-lots 1 to 8 inclusive in Snow & Company's subdivision of lots 15 and 16, lapsed by failure to file the remanding order of the Supreme Court within two years after the reversal of the order of dismissal entered by the Circuit Court of Cook County. (*City of Chicago* v. *Mecartney*, 216 Ill. 377.) In order, therefore, that the balance of the condemnation awards might be paid, it being impossible to proceed with the old assessment suit, the city instituted these new proceed-

ings to raise the required amount, in very much the same way as new proceedings were instituted in the case of *City of Chicago* v. *Race*, 256 Ill. 209, cited by opposing counsel.

On January 25, 1910, the court vacated all orders in the old assessment proceeding and granted leave to the city to file a new supplemental petition, which was accordingly done, and on March 1, 1910, a new assessment roll was filed.

Opposing counsel has cited a long list of cases under his Chapter 3, in an attack upon this new proceeding on the ground that the court had no jurisdiction to enter the order of January 25, 1910, vacating all former assessment proceedings herein. The basis for such contention is that the court cannot enter an order vacating an assessment proceeding after the term at which the judgment was rendered. As previously stated, this is not disputed. But plaintiffs in error are not within this rule, because no formal judgment of confirmation was ever entered against their lands.

In the case of *McChesney* v. *City of Chicago*, 161 Ill. 110, cited by opposing counsel, a judgment of confirmation was rendered against appellant's lands in the County Court, and while an appeal from that judgment was pending in this court the City of Chicago attempted to abandon the old proceeding and to proceed with a new one. The County Court vacated the judgment confirming the assessment and annuled the entire proceeding. This order the Supreme Court held was void, the court not having jurisdiction to vacate the order after the term.

In *People* v. *McWethy*, 165 Ill. 222, the same ques-

tion was involved as in the McChesney case, *supra,* and the decision was the same.

The case of *LeMoyne* v. *Chicago,* 175 Ill. 356, was a condemnation suit brought under Article 9 of the Cities and Villages Act of 1872 of Illinois. A verdict was returned, and judgment entered thereon. Assessment proceedings were afterwards brought to raise money to pay said award. Later one of the property owners moved the court to dismiss the original proceeding as to his lands for failure of the city to pay his award within two years. This motion was granted, and the suit was dismissed as to his property only. Subsequently a new assessment proceeding was brought upon the theory that the dismissal of the condemnation suit, as to these lands only, invalidated the entire assessment proceedings. The court, however, at page 358, said:

> "The contention that the dismissal of the former condemnation proceedings puts an end to the assessment made thereunder is not supported by reason or authority. The dismissal of the condemnation suit by the owner of the property sought to be taken affected that property only. Appellants were not parties to that act of dismissal and are not bound thereby. As to them, the condemnation proceeding and the special assessment proceeding were entirely distinct."

The court held that since the first assessment had been confirmed and the judgment therefor had not been reversed, a second assessment would be barred.

This case has no application to the facts of the case at bar, because here there never has been a judgment of confirmation as to the property involved in this proceeding, and there never has been any

attempt to levy a new assessment on the property against which a judgment of confirmation was already in force.

In *Rich* v. *Chicago*, 187 Ill. 396, an attempt was made to levy a second assessment for an improvement for which an assessment had been confirmed in a prior proceeding. The city's counsel moved the court to set aside the first judgment. The record did not show whether that was done. This court, however, at page 397, said:

> "That is immaterial, however, as the court had no power in 1898 to set aside the judgment rendered at a prior term in 1895. As the judgment had never been reversed and was in full force, it was a bar to another judgment sought to be recovered confirming another assessment for a similar improvement of the same street." (Citing *McChesney* v. *City of Chicago*, 161 Ill. 110; *People* v. *McWethy*, 165 Ill. 222.)

In *Doremus* v. *Chicago*, 212 Ill. 513, an assessment was levied and confirmed against the property of appellants for improving West Madison street. Said assessment was not paid. Application for judgment and order of sale for the years 1895, 1897 and 1898 having been withdrawn or denied, the city, on March 3, 1903, passed an ordinance for a new assessment to pay for the improvement. The ordinance recited the prior proceeding and the refusal of the court to render judgment and order of sale on the original assessment as to certain lots. This proceeding was brought under Section 60 of the Act of 1897 (identical with Section 48 of Article IX). The objectors pleaded the five years statute of limitations, and this court held that the objection was well taken. The court said at page 517:

"We think it clear, in this case, that the order of the County Court refusing judgment and order of sale did not have the effect of setting aside the original assessment within the meaning of Section 57, *supra*. That assessment is, as far as shown by this record, in full force and effect, and the city council was without power to pass the new ordinance levying a second assessment under that section. The only authority given to do so must have been in Section 60, under which it could only have been done within five years from the confirmation of the original assessment. Having failed to act within the time required by the statute, it was barred, and its action without force or effect." (Sec. 57 =46 of Art. IX.)

Opposing counsel cites this same paragraph from this case, but fails to apply it to the facts at bar, otherwise than to allege generally that this proceeding "is simply hung in the air." He fails to distinguish that the statement contained in the Doremus case, which he attempts to cite in support of his proposition, is based upon the proposition that an assessment had been confirmed against certain property, and that after such assessment had been confirmed it was impossible to make a new assessment against that same property against which the assessment had already been confirmed, except under Section 60 (identical with old Section 48).

The gist of this Doremus case is that the original judgment of confirmation was valid, and that the refusal of the County Court to enter judgment and order of sale did not invalidate the original judgments of confirmation, and that such judgments remained in full force and effect.

This Doremus case differs from the Race case,

*supra,* in this, viz., that in the Race case the refusal of judgment and order of sale was based on lack of jurisdiction in the original confirmation which had the effect of setting aside the original judgment of confirmation, while in the Doremus case the original judgment of confirmation continued in full force. **In the case at bar, however, there never had been even an original judgment of confirmation as to the property before this court.**

Therefore the order of January 25, 1910, annulling former assessments, dismissing prior petitions and giving leave to file a new petition, etc. (Rec., 3), was simply a precautionary measure upon the part of the City of Chicago to wipe out all former proceedings. It was not necessary for the purpose of vacating any prior judgment as to the property here involved because there never had been any prior judgment. And the Supreme Court of Illinois construes the situation in this way. (Printed Rec., bottom page 67.)

In the Doremus case, however, no new assessment proceeding could be brought except under Section 60. That section was the same as Section 48 of said Article 9 of the Cities and Villages Act of 1872. These sections limited the levy of new assessments against delinquent lands to five years. The lots of plaintiffs in error are not delinquent within the meaning of that section (or Section 48) because no judgment of confirmation was entered against them. Hence the limitation does not apply.

In the cases of *City* v. *Nichols,* 192 Ill. 489, *Holden* v. *Chicago,* 212 Ill. 289, *Chicago* v. *Hulbert,* 205 Ill. 346, *Chicago* v. *Nodeck,* 202 Ill. 257, and *Noonan* v.

*Chicago,* 231 Ill. 588, cited by plaintiffs in error, there was in each case a valid judgment of confirmation, and an attempt was made to vacate the same long after the terms of court at which they were rendered had expired. There is no doubt that this cannot be done. We wish that opposing counsel had attempted to apply these cases to the case at bar, so that we might see upon what theory he believes they are applicable. We fail to understand their application.

In the case at bar the only judgment of confirmation that was ever rendered against the lands in question here, and involved before this court, is the judgment affirmed by the Illinois Supreme Court in this case, and from which a writ of error has been brought to this court. It is true there were several verdicts by jurors rendered against this land, but no judgment was ever rendered, excepting the one now being reviewed. This is quite evident from the statement in the case of *City of Chicago* v. *Thomasson,* 259 Ill. 322, at the bottom of page 331: "Appellant was all the time contending that his lots in said Snow & Company's subdivision (being the only ones specially benefited which had not been assessed) were not liable for special assessment in this proceeding."

In the case of *Murray* v. *City of Chicago,* 175 Ill. 340, there was an ordinance for the assessment to pay for certain water pipes in the City of Chicago. Originally, the ordinance was divided into 10 instalments. Four instalments were paid, then the property owners refused to pay the fifth, and on application of the county collector to sell the property by reason of the delinquency in payment of

taxes, objections to judgment of sale were sustained on the ground that the statute then in force did not authorize the division of the assessment into more than five instalments, according to the case of *People* v. *Nelson*, 156 Ill. 364. A supplemental assessment was then levied under Section 46 of said Article IX to pay for the balance of the benefits, that is, the actual cost was to be paid by special assessment, and those who had paid certain amounts were to be credited with the amounts they had paid.

It was contended that the new assessment proceedings were barred by reason of the special limitations contained in said Article IX of the Cities and Villages Act. On this point the court held:

> "The only sections of Article IX relating to new or special assessments are sections 46, 47 and 48. Each one of these sections provides for a different contingency. Section 46 provides that if any assessment shall be annulled by the City Council or the Board of Trustees, or set aside by any court, a new assessment may be made and returned. Section 47 provides that if, in any case, the first assessment prove insufficient a second may be made, and so on until sufficient money shall have been realized to pay for the improvement; section 48 provides that if from any cause, any city or village shall fail to collect the whole or any portion of any special assessment which may be levied, which shall not be cancelled and set aside by the order of any court, the municipal authorities may, at any time within five years after the confirmation of the original assessment, direct a new assessment to be made, etc. In *Pardridge* v. *Village of Hyde Park*, 131 Ill. 537, the court set aside the original assessment roll after the lapse of 12 years, and ordered a new

one made, and on review of the judgment confirming the latter, this court said that section 48 had no application where the original assessment was never confirmed, and that the limitation did not apply. (See also *Phila. & Reading Coal Co.* v. *City of Chicago*, 158 Ill. 9.) * * * The language of section 48 is, 'which shall not be cancelled and set aside by order of any court.' The provision of the original order dividing the assessment in 10 instalments was by judgment of this court in *People* v. *Nelson, supra*, declared void, and the consequence was that the judgment of confirmation was left void. (*Culver* v. *People*, 161 Ill. 89.)

Counsel for appellants say that section 46 does not apply, because the assessment was not set aside. We are of the opinion that the effect of the judgment of this court was to set the assessment aside, and that therefore, the proceedings for the new assessment properly fall under section 46, which contains no limitation."

In other words, the judgment of the trial court in the case of *City of Chicago* v. *Mecartney*, which sustained the objections as to this property, was equivalent to denying confirmation of the assessment as to this property, although there was a confirmation as to the property in the balance of the roll. Then the Supreme Court of Illinois in said Mecartney case, 216 Ill. 377, reversed this finding of the trial court. Inasmuch, however, as said remanding order was not filed within the required two years, and no mandate was filed in the trial court, there never has been any judgment of confirmation as to this property.

In the case of *Pardridge* v. *Hyde Park*, 131 Ill. 537, the court held at page 540 that:

"Section 48 of Article IX, which directs that in a certain contingency, the Board of Trustees

> may direct a new assessment to be made 'within five years after the confirmation of the original assessment' has no application here, because the original assessment was never confirmed."

In that case, as here, there never had been a judgment of confirmation against the land in question.

In the case of *Freeport St. Ry. Co. et al.* v. *Freeport*, 151 Ill. 451, there was a voluntary payment of an illegal assessment by one property owner, and the court held that that did not take away a power to make a reassessment in case the illegal levy was set aside as to the other property holders, but that such reassessment was justified under Section 46 of Article IX, which is the same as Section 57 of the Local Improvement Act.

Here again is a recognition of the principle that a special assessment judgment operates as a several judgment against each separate tract of land. That is in the case at bar the judgment of confirmation of the rest of property in the assessment roll did not in any way affect the property involved here against which there has never been a judgment of confirmation.

(*b*) The Interpretation of Section 48 of Article IX.

Opposing counsel has set out Section 48 of Article IX in full on page 7 of the appendix to his brief on the merits. We desire to call to the attention of the court the use of the word "delinquent" in this section. By "delinquent" the law means lands against which there has been a valid judgment of confirma-

tion and which assessment for some reason cannot be collected. Clearly this section has reference only to delinquent lands which have escaped the payment of assessments duly levied and confirmed against them.

A tract of land against which there is a special assessment cannot become delinquent until there has been rendered against it a valid judgment of confirmation, a certification of said tract in the assessment roll to the city or village collector for collection under the statute, and a refusal or neglect to pay the city or village collector. This situation constitutes a delinquency under the law and it then becomes the collector's duty to report the same to the county collector. When the statute refers to delinquent land it refers to such lands as have not paid their assessment to the city or village collector. Of course that situation presupposes a judgment of confirmation.

That this is the interpretation placed upon Section 48 of Article IX (Section 60 of the Local Improvement Act) by the Illinois courts can be seen from an examination of the following language from the case of *City of Taylorville* v. *Johnson*, 242 Ill. 175, where at page 177 the court says:

> "It is contended on behalf of the city that the new assessment is authorized by Section 60 of the Local Improvement Act, which provides that 'if from any cause any city, village or town shall fail to collect the whole or any portion of any special assessment or special tax which may be levied, which shall not be cancelled or set aside by the order of any court, for any public improvement authorized to be made and paid for by a special assessment or special tax, the

city council or board of trustees may, at any time within five years after the confirmation of the original assessment, direct a new assessment to be made upon the delinquent property for the amount of such deficiency and interest thereon from the date of such original assessment,' etc. (Hurd's Stat. 1908, p. 437.) Before an assessment can be made under this section upon any property it is necessary that a previous assessment shall have been made on such property which the city shall have been unable to collect and for which such property shall be delinquent. The judgment of confirmation of a special assessment is a several judgment against each tract. *The record does not show that any judgment of confirmation was entered against the land involved in this proceeding.* There was no assessment levied against it, no deficiency for which it was delinquent, no tax or assessment which the city had failed to collect." (Italics ours.)

(*c*) The Construction of Section 53 of Article IX of the Cities & Villages Act of 1872 of Illinois.

Opposing counsel on page 17 of his brief on the jurisdictional question and page 31 of his brief on the merits denies that Section 53 (page 8 appendix to his brief on the merits) can in any way apply to the assessment at bar because this is a reassessment or a new or deficiency assessment. Counsel evidently forgets, as we have already endeavored to show, that this is not a deficiency assessment. Then counsel proceeds to state that under Section 53 there was only one confirmation authorized. This seems like a candid recognition of the purpose of Section 53, viz., to authorize supplemental petitions to be filed for

the levy of an assessment to pay the condemnation awards in the same condemnation proceeding and without the necessity for the passage of a new ordinance. Of course, there never has been a confirmation of the property at bar, so we are entirely within even counsel's interpretation of Section 53, viz., that under it only one confirmation is authorized.

The City of Chicago had the right to proceed against this property under Section 53 in the same manner as though no assessment had ever been levied against the same. That Section 53 applies can readily be seen from the opinion of this court in *Pearson* v. *City of Chicago*, 162 Ill. 383.

In that case the objectors contended that the court had no power to enter the order vacating the assessment proceedings in the Hutt case, also that no notice was given to them of the application for order of vacation and dismissal. The court says, p. 385:

> "The grounds of the motion were inconsistent with each other, since appellants could have no interest to be affected by notice of a proceeding which had been abandoned."

The court then says that it was unnecessary to have the order entered annulling the old proceeding and dismissing the old supplemental petition. The court says, p. 385:

> "The first petition had been so abandoned, and it was unnecessary to dismiss it; but appellants were in no wise harmed by its being done."

In the Pearson case, as in the case at bar, the failure to file the remanding order within two years after the reversal of the case of itself worked an abandonment or annulment of the old proceeding,

making unnecessary the passage of an annulling ordinance or the entry of court orders vacating the old proceedings and dismissing the old supplemental petition as to such property.

In the Pearson case the point was also made that no new ordinance was passed authorizing the improvement and objectors there cited the case of *Guild* v. *City of Chicago,* 82 Ill. 472, to sustain their position. The court, however, said, p. 386:

> "In *Guild* v. *City of Chicago,* 82 Ill. 472, it was said that by Section 22 of Article IX of the City and Village Act, the supplemental petition for an assessment is required to recite the ordinance for the improvement and the report of the commissioners as to its cost, and that case is relied upon in support of the motion to dismiss. This proceeding was not under that section, but under Section 53 of said Article IX, which contains no such requirement, and what was said in that case concerning the other section is of no importance in this. Under Section 53 the supplemental petition is based upon the condemnation judgment, and there is no estimate of the commissioners as to the cost of the improvement previous to the filing of the petition."

This opinion approves Section 53 of Article IX as the proper procedure in cases of this character and holds that an ordinance for a new assessment is unnecessary.

This is the reasoning upon which the Supreme Court of Illinois based its decision in the case at bar. (Printed Rec., p. 67.) Counsel confesses to an inability to understand the connection between Sections 46 and 53, but he should have examined the opinion on page 67 of the Printed Record, as well as on page 65. The court there says that assessment proceed-

ings were authorized and allowed to be instituted under warrant of Section 46; and Section 53 prescribed the procedure thereof (viz., that the original ordinance in the condemnation proceeding was sufficient and that it wasn't necessary to pass another ordinance before filing the supplemental petition for the assessment).

In this argument on the merits we have attempted to show, first, that there is a complete statutory warrant for the assessment judgment at bar; second, that plaintiffs in error bought the property here involved after the passage of these statutes and while they were in full force and effect, as far at least as this proceeding was concerned, and, third, that these statutes had received the same judicial interpretation, before the property here involved was purchased by these plaintiffs in error, as the said statutes had received after said purchase and in this proceeding.

We have endeavored to analyze this case on the merits in the attempt to aid this court in applying its well settled jurisdictional rules to the particular facts at issue and also because we believe that the judgment of the Supreme Court of Illinois should be affirmed independently of any jurisdictional reasons. We respectfully urge upon this honorable court, however, to examine the following argument on the jurisdictional question, because we feel that this is one of those clear cases where this court can dismiss this writ of error for lack of jurisdiction and save much time in the determination of purely local issues.

## ARGUMENT ON THE JURISDICTIONAL QUESTIONS.

### I.

AS A MATTER OF PROCEDURE, NO FEDERAL QUESTION HAS BEEN PROPERLY PRESERVED FOR REVIEW IN THIS COURT.

The first question presented by plaintiffs' in error reply brief in opposition to the motion to dismiss is the proposition that the Federal question was properly preserved in order that it might be reviewed in this court.

Upon this question we respectfully submit for the consideration of this court the case of *Hulbert* v. *City of Chicago,* 202 U. S. 275, which was a writ of error to the Supreme Court of the State of Illinois to review a judgment affirming the judgment of the County Court of Cook County, in that state, confirming an assessment for a public improvement. This court there held, at page 281:

> "Errors assigned but not noticed or relied on in the brief or argument of counsel will be regarded as waived or abandoned. (*Keyes* v. *Kimmel,* 186 Ill. 109, 114.) And such rule of practice will be recognized by this court (*Erie R. R. Co.* v. *Purdy,* 185 U. S. 148), which follows that this court has not jurisdiction of this writ of error.
>
> *Oxley Stave Company* v. *Butler County,* 166 U. S. 648.
>
> *Capital City Dairy Company* v. *Ohio,* 183 U. S. 238.
>
> *Chapin* v. *Fye,* 179 U. S. 127."

An inspection of the record in this case will show

that plaintiffs in error did not raise any Federal questions in the trial court, and that they were, therefore, barred from raising such questions in the State Supreme Court. Plaintiffs' in error exceptions on the legal objections and on benefits failed to show any reference to this question, nor does their written motion for a new trial cover the same. For the convenience of the court we have set out these objections in the appendix to this brief, on pages 91-101, together with references to the record in this case.

In the case of *Kelly* v. *City of Chicago*, 148 Ill. 90, the court says, in commenting upon the proper place to urge objections:

> "It is also urged that the ordinance is void for the reason that it does not set forth with sufficient certainty the nature, character and locality of the improvement. A sufficient answer would be that no objection to the sufficiency of the ordinance in this or any other respect was filed or made in the County Court. That court was not called upon to pass or determine the question now sought to be raised, and it comes too late upon appeal. (*Hunerberg* v. *Village of Hyde Park*, 130 Ill. 161.)"

In the case of *Watts* v. *Village of River Forest*, 237 Ill. 231, one of the points urged in the State Supreme Court was that the property of the objector was assessed as one tract of land when the assessment should have been spread against two tracts of land. The court says, page 34:

> "So far as we can find from the abstract of record, the question of this property being assessed in gross, instead of two parts or parcels, was not raised or decided by the court below. Hence, under the decisions of this court, it cannot be insisted upon here. (*Close* v. *City of Chi-*

*cago,* 217 Ill. 216; *Clark* v. *City of Chicago,* 214 Ill. 318.)"

The case of *South Chicago City Railway Company* v. *City of Chicago,* 196 Ill. 490, likewise squarely decides that a point not urged in the trial court is thereby waived. As stated by this court in the Hulbert case, the local rule of practice will be recognized by this court. There is no question, from an examination of the Illinois cases, that the local rule of practice is clearly to the effect that a Federal question cannot be raised for the first time in the court of last resort of the state, but that the neglect to raise it in the trial court must be considered as a waiver of that question. It is likewise clear that the record here shows that no such question was raised in the trial court. We note that counsel for plaintiffs in error, both in his brief on the question of jurisdiction and in his brief on the merits, has printed the assignment of errors in the Illinois Supreme Court. There is no question that the assignment of errors in the Illinois Supreme Court mentions Federal questions, but our contention is that inasmuch as the record shows that this was the first time that a Federal question was ever mentioned, and inasmuch as, under the rules of the Illinois practice, which are recognized by this court, such a question could not be raised for the first time in the Illinois Supreme Court, that, therefore, said question was disregarded by the Illinois Supreme Court, and was properly so disregarded.

We further contend that:

(*a*) *The Decision of the Supreme Court of Illinois is Sustainable on Grounds Entirely of State Law and does Not Involve any Federal Questions.*

An examination of the opinion of the Supreme Court of Illinois will disclose that the case was decided on grounds not involving any Federal questions within the rule laid down by this court in the cases of *Beatty* v. *Benton,* 135 U. S. 244; *Marrow* v. *Brinkley,* 124 U. S. 178; *Hale* v. *Akers,* 132 U. S. 554; *San Francisco* v. *Itsell,* 133 U. S. 65; *Hopkins* v. *McClure,* 133 U. S. 380.

These last mentioned cases likewise decide that if any of the questions decided by the State Supreme Court were questions of general law, and the case was disposed of by the decisions of such questions of general law, that then this court has no jurisdiction.

As previously stated, however, in commenting upon the Hulbert case, it will be seen that not only did the State Supreme Court not actually decide any Federal question, nor was any Federal question necessarily involved in its decision, but under the rules of Illinois practice it would have been improper for the State Supreme Court to have decided any Federal question raised for the first time in the court of last resort. This proposition, clearly established by the Illinois decisions outlined above, to the effect that no Federal question was properly presented before the Illinois Supreme Court, inasmuch as it had not been presented to the trial court (even although suggested in the assignment of errors), fully settles the question, we respectfully contend, that the State Supreme Court did not and could not have decided any Federal question. Therefore, there is no Federal question to be reviewed by this court.

As further authority for the proposition that no

Federal question can now be passed upon by this court, we submit the well known rule of this court that the United States Supreme Court will not entertain jurisdiction of state judgments where, besides Federal questions decided by the state court, there is another and distinct ground on which the judgment can be sustained.

*Kennebec & P. R. Co.* v. *Portland & K. R. Co.*, 14 Wall. 23.

*Rector* v. *Ashley* 6 Wall. 142.

*Gibson* v. *Chouteau*, 8 Wall. 314.

*Klinger* v. *Missouri*, 13 Wall. 257.

(*b*) *To Give this Court Jurisdiction, it Must Appear Affirmatively on the Face of the Record not only that a Federal Question was so Raised, but that it was Decided, or that its Decision was Necessary to the Judgment or decree rendered in the case.*

*Detroit City R. R. Co.* v. *Guthard*, 114 U. S. 133.

(*c*) *It is not enough to Give this Court Jurisdiction over the Judgment of the State Court for the record to show that a Federal Question was Argued or Presented to the Court for Decision. It Must Appear that its Decision was Necessary to the Determination of the Case, and that it was Actually Decided, or that the Judgment Could not have been Given Without Deciding it.*

*Moore* v. *Mississippi*, 21 Wall. 638.

*Bowling* v. *Lersner*, 91 U. S. 94.

*Brown* v. *Atwell*, 92 U. S. 327.

*Citizens' Bank* v. *Louisiana Board of Liq.*, 98 U. S. 140.

While we believe that this court could properly dismiss this case for want of jurisdiction on the ground first stated above, to the effect that this court is accustomed to follow the rule of state practice; which in this case would have prevented any consideration of the Federal question of the State Supreme Court, we have also submitted the last three propositions, because we believe that even if it should be assumed that a Federal question could have been, or was, properly considered by the State Supreme Court, that even in that event the decision of the State Supreme Court could have been properly based upon the construction of the state statute and the general rules of law, without regard to any Federal question.

## II.

NO FEDERAL QUESTION IS PRESENTED FOR REVIEW ON THE THEORY THAT THE PROVISION OF THE FOURTEENTH AMENDMENT FORBIDDING THE DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW HAS BEEN VIOLATED. THERE HAS BEEN A FULL AND COMPLETE HEARING IN THE REGULAR COURSE OF JUDICIAL PROCEEDINGS.

Opposing counsel contends that this case is properly reviewable by this court because the judgment upon its face is a pure confiscation of property.

In support of this contention the case of *Norwood* v. *Baker*, 172 U. S. 269, is cited. So far as we are able to ascertain, this is the only case in which this court has taken jurisdiction of a special assessment case, on the ground that the special assessment as levied was excessive. An examination of

the case of *Norwood* v. *Baker*, however, clearly shows that the facts there before the court were entirely different from the facts before the court in this proceeding. That case also arose out of the condemnation of certain lands for the purpose of opening a street in the Village of Norwood, a municipal corporation in the State of Ohio. In that case also there was presented for the court's consideration the validity of a village ordinance assessing upon private property a sum of money sufficient to pay the condemnation awards and certain costs and expenses connected with the condemnation proceedings. The ordinance provided that the costs and expenses of the condemnation of the property, including the compensation paid to the owners, cost of the condemnation proceedings, cost of advertising, and all other costs, and the interest on bonds issued, if any, should be assessed, "Per front foot upon the property bounding and abutting on that part of Ivenhoe avenue as condemned and appropriated herein." In that case the award for property condemned was determined by the jury, but the assessment was determined entirely by the Village Council, irrespective of the question of benefits, and no opportunity was given to the property owner assessed to have a jury determine the amount of benefits.

The court, at page 278, in this case, held:

> "Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property—such assessments, according to well established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public

improvements. (*Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704; *Illinois Central R. R. Co.* v. *Decatur*, 147 U. S. 190, 202; *Bauman* v. *Ross*, 167 U. S. 548, 589.) * * * And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements."

In that case (*Norwood* v. *Baker*), however, the assessment had been levied upon the abutting property owner, upon a per front foot basis, irrespective of the question of benefits. In other words, there was there an arbitrary determination by the village authorities that a certain sum of money necessary to pay the condemnation awards should be assessed against a certain number of feet of land, and each front foot of land had to bear an assessment in exact proportion to the number of feet in such district, irrespective of the question whether, as a matter of fact, it was actually benefited the amount assessed. That this was the reason that this court took jurisdiction of the case and held that there was a deprivation of private property, without due process of law, can be determined from the following holding of the court, at page 279:

"But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property *of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country.*

It is one thing for the legislature to prescribe it as a general rule that property abutting on

> a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. *It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show; when an assessment of that kind is made, or is about to be made; that the sum so fixed is in excess of the benefits received.*" (Italics ours.)

In other words, the assessment before this court in the Norwood case was not properly a special assessment as technically known in the Illinois law, but rather a special tax ordinance, the distinction being that in a special tax ordinance an assessment is levied on a front foot basis by the municipal authorities, while in a special assessment, the assessment levied is that determined on by the jury to be equal to the benefits received.

In the Norwood case, this court again held, at page 285:

> "Whenever a local assessment upon an individual is not grounded upon *and measured by the extent of his particular benefit*, it is *pro tanto*, a taking of his property for public use without any provision for compensation."

Here again is a recognition of the proposition that private property is only taken without compensation when the assessment is levied without regard to benefits received. This same proposition is again enunciated on page 288 of this case, where the court holds as follows:

> "*Special benefits actually received* by each

parcel of contributing property *was the only principle upon which such assessments can justly rest*, and that any other rule is unequal, oppressive and arbitrary, * * * asserted what must, *upon principle, be regarded as the just and reasonable doctrine* that the cost of a local improvement can be assessed upon particular property *only to the extent that it is specially and peculiarly benefited;* and *since the excess beyond that is a benefit to the municipality at large*, it must be borne by the general treasury."

The court further on held, referring to the particular assessment ordinance, that:

"It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account, and that was the method pursued by the Village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not, to the extent of such cost."

The court held that there was no opportunity for the property owner to contest by any showing or the production of any witnesses the amount which the village authorities determined upon as his assessment; for the court upon this point held:

"The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. *The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits.*" (Italics ours.)

There is nothing in this whole opinion, however, which states either directly or by inference that this court has any jurisdiction to interfere where an assessment has been made according to benefits, even although the property owner believes that the benefits should have been lower than those determined by the jury and the court. It is a well known principle not only of law, but of human nature, that every man believes that his property is benefited less than the jury and court determines it is benefited. The mere fact, however, that he disagrees with the determination of the jury and the court does not warrant Federal review of the verdict of the jury and the finding of the court.

The court finally held in this case, at page 297, that:

> "The judgment of the Circuit Court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule *which excluded any inquiry as to special benefits*, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

We have discussed this case somewhat at length, because it is the only Federal case cited by opposing counsel upon the proposition that the assessment in this case is the taking of private property without due process of law. So strongly, however, do we believe that this case supports the contention of the City of Chicago that we would be willing to ask for an affirmance of the Illinois court upon the ground of this case alone.

Page 16 of opposing counsel's brief on the merits will show that the commissioners' estimated proportionate cost of benefit to the public and to be assessed to the City of Chicago was "no dollars." No question then that the city should pay any of this assessment!

We find on page 17 of opposing counsel's brief on the merits, this further statement:

> "A trial was had in the spring of 1910 by jury, *which sustained the assessment by verdict,* and judgment was entered." (Italics ours.)

An examination of the record in this case will show that no less than seven witnesses testified on the question of benefits, and that their testimony comprises pages 196 to 393 of this record. The printed record submitted to this court, on pages 5 to 60, is taken up entirely with the evidence of three witnesses on this question of benefits, one witness in behalf of the plaintiffs in error, and two witnesses in behalf of the city.

Under these circumstances, it can certainly not be contended that the question of benefits was not fully and completely brought to the attention of the jury. A great number of days were spent by the trial court in the consideration of this evidence and the testimony of these witnesses. Even Mr. Mecartney (in his testimony on page 15 of the printed record), one of the chief plaintiffs in error, and a witness in their behalf, frankly admits that the property involved in this proceeding was benefited by the improvement. On page 20 of the printed record he states that the benefit would be $3,600. On the bottom of page 24 of the printed record, he states the opening was unquestionably a benefit to the property.

On page 35 of the printed record, Mr. Chadwick, testifying in behalf of the city, stated that the benefit was $8,100, and he further proceeds on pages 37 and 38 to carefully go into the reasons upon which his estimate is based.

Mr. Draper, on page 52 of the printed record, likewise testified that the property would be benefited some $8,100. He further testifies on page 56 that the benefit was greater than the assessment. In fact, an examination of the testimony of a great majority of the witnesses will show that the benefit was greater than the amount assessed in this proceeding, namely, the assessment here before this court for consideration.

On this proposition then, the question simply narrows itself down to this: The property of plaintiffs in error has been assessed a certain sum, and a long and arduous trial was held to determine whether that sum was too high or too low. Full opportunity was given to the objectors before the trial court (the plaintiffs in error before this court) to introduce evidence on the question of benefits. Such evidence was introduced both on behalf of the objectors and on behalf of the petitioning municipality. The jury had an opportunity to listen to all the evidence. The court likewise had the same opportunity, and had the further right to set aside the verdict of the jury, if, in its opinion, the verdict was clearly unsupported by the facts. That the trial court did not set aside the verdict of the jury is ample proof that the verdict of the jury was supported by the facts. The plaintiffs in error did not believe that the property was benefited as much as it was assessed. It was

only natural that they should think so, or they wouldn't have objected to the assessment. The whole matter, however, was purely a question of fact, which was stubbornly fought in a long and arduous trial. At the conclusion of that trial, the jury, who listened to the evidence of witnesses, found the issues in favor of the petitioning municipality, and now this court is asked by the plaintiffs in error here (the objectors below) to exercise the functions of a trial judge and set aside the finding of the lower court, which was supported by the verdict, on the ground that the assessment exceeds the benefits. Such a request is unprecedented. If this court should have jurisdiction in such a matter as this, it would have jurisdiction whenever any unsuccessful litigant believes that because the testimony of his witnesses is different from the verdict of the jury, or because he disagrees with the verdict of the jury, that he should then have relief in this forum.

Counsel further lays emphasis upon the fact that the assessment is slightly greater than the award, and that therefore there has been a confiscation of his property. Upon this proposition we wish to say that the award was determined by a jury in the regular course of legal proceedings, with opportunities to both sides to be fully heard, and that the assessment was determined in the same manner. It is not at all impossible that in a specific case the benefit to the property owner derived from the widening of a certain street might be twice or even three times greater than the amount awarded to that same property owner for the taking of his property. He is not asked to pay an assessment for the benefits derived merely from the widening of

the street in front of his own property, but for the widening of the street taken as a whole. In other words, he is asked to pay for benefits derived from the whole proceeding. However, we believe that such an argument on this matter is improper before this court. It is purely a question of fact and it is well settled that:

(*a*) *The Decision of a State Court is Conclusive upon Questions of Fact.*

This principle is clearly supported by the following cases:

*Thayer* v. *Spratt*, 189 U. S. 346.
*Avery* v. *Potter*, 179 U. S. 305.
*Eastern Building & Loan Assn.* v. *Ebaugh*, 185 U. S. 120.

To like effect is the case of *Lent* v. *Tillison*, 140 U. S. 316, where the court holds as follows:

> "If we had any doubt as to the correctness of these views, we should accept the interpretation which the highest court of the state places upon the statute. When the inquiry is whether a state enactment under which property is proposed to be taken for a public purpose accords full opportunity to the owner at some stage of the proceedings involving his property to be heard as to their regularity or validity, we must assume that the inferior courts and tribunals of a state will give effect to such enactment as interpreted by the highest court of that state."

The case of *Corry* v. *Campbell*, 154 U. S. 629, is authority for the proposition that errors of state courts in respect to the details of assessments of municipal corporations for such improvements which are claimed not to furnish due process of law cannot be considered by the Supreme Court of the

United States on writ of error to the state court, but that the only inquiry open is whether sufficient provision has been made by law for contesting the assessment by an appropriate proceeding in the ordinary courts of justice.

In *Kelly* v. *Pittsburgh*, 104 U. S. 78, it was urged that land which the owner has not laid off for town lots, but occupied for agricultural purposes, and through which no streets are run or used, cannot be even by the legislature subjected to the tax of a city. The reason for this was said to be that such tax was for the benefit of those in the city who owned property within the limits of such improvements, and who used or might use them if they choose, while he reaps no such benefit. Cases were cited from the higher courts of Kentucky and Ohio where this principle was involved, and where those courts have held that farm lands in the city are not subject to the ordinary city taxes. On this point, however, the court held:

> "It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those states and their own state authorities, and afford no rule for construing the Constitution of the United States. * * * the main argument for the plaintiff in error—the only one to which we can listen—is that the proceeding in regard to the tax assessed on his land deprives him of his property without due process of law.
>
> The distinct ground on which this provision of the constitution of the United States is invoked, is that said land in question is, and always has been, used as farm land for agricultural use only and subjecting it to taxation for ordinary city purposes deprives the plaintiff in

> error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its probable value. Whether this be true or not, we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of state tribunals on that subject, that it is only necessary to refer to those decisions, without a re-statement of the argument on which they rest. (State Railroad Cases, 92 U. S. 575; *Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S. 480; *Davidson* v. *New Orleans*, 96 U. S. 97; *Kirtland* v. *Hotchkiss*, 100 U. S. 191; *Mo.* v. *Lewis*, 100 U. S. 22; *German Nat. Bank* v. *Kimball*, 103 U. S. 832.)"

Applying the reasoning of these cases to the facts at bar, it might be possible that if this court were going to try this case *de novo* as a trial court, it might decide the question of benefits differently from the way in which they were decided by the jury and the trial judge in this proceeding. This court might have found that the property for which an assessment has been confirmed by this proceeding was, in fact, benefited less or possibly even more than the assessment as confirmed. To come to such conclusion, however, would it not be necessary for this court to go into all the details of the evidence which the jury and the trial judge examined? We believe it is a sufficiently elementary principle not to need further demonstration, that this court is not accustomed to assume jurisdiction in such cases, but on questions of fact it will accept the conclusions of the state court. It might be that this court, if it had gone into such an examination of the evidence, might have agreed with opposing counsel, as stated on page 26 of his brief on the merits, that the Park

property should have been assessed for the benefits of this improvement, of widening South Park avenue, together with private property. This court might also have believed that the limits of the assessment district were too great or too small, and so might have wished to increase or diminish the possible proportionate share which plaintiffs in error would have had to pay as benefits for this improvement. We feel, however, that all these questions are minor details of evidence which it would be improper for us to go into before this tribunal, and a discussion of which this court would not tolerate. As stated in the case of *Spencer* v. *Merchant*, 125 U. S. 345:

> "Where the work is one which the state had authority to do and to pay for by assessment on the property benefited, objections that the sum raised is exhorbitant, and that part of the property assessed was not benefited, presents no question under the Fourteenth Amendment."

This Spencer case is authority for the proposition that the question of the proper limits of the assessment district is, of necessity, a question of fact, and does not present a Federal question sufficient to entitle it to be reviewed by this court, or, as further stated in the case of *Kelly* v. *Pittsburgh, supra:*

> "Clearly, however, these are matters of detail within the legislative discretion, and therefore of power in the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purpose is taking the property of the tax payer without due process of law."

If for some reason the legislature or the assessing commissioners, acting in pursuance of legislative

authority, decided that the Park property could not or should not be assessed and the jury, after an examination of such evidence, confirmed such assessment, we do not believe that this court will wish to review such a verdict. Opposing counsel should also bear in mind that the trial judge had authority to sustain the legal objections to the confirmation of the improvement if he believed that the assessment district was too small and did not include either the proper territory or a sufficient area.

As said in the case of *Baldwin* v. *Kansas*, 129 U. S. 52:

> "The question whether the evidence in the case was sufficient to justify the verdict of a jury, and the question whether the constitution of the state was complied with or not, in the proceedings on trial, are not Federal questions which the Supreme court of the United States can review."

This question of the power of this court to review evidence is well stated in the case of the *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, as follows:

> "Whatever may have been the power of the trial court to set aside the verdict as not awarding just compensation, or the authority of the Supreme Court of Illinois under the constitution, and laws of the state to review the facts, can this court go behind the final judgment of the state court for the purpose of re-examining and weighing the evidence and determining, whether, upon the facts, the jury erred in not returning a verdict in favor of the railroad company for a larger sum than one dollar?"

To this question the court emphatically said *no*, on the ground that it seemed clear that this court could not retry the facts tried by the jury in the trial court.

We believe that the award of the jury for the land condemned and the verdict of the jury in fixing the benefits in this proceeding were both correct. Whether, however, the award should have been greater or the assessment should have been less can hardly be determined by this court without retrying the whole case.

We surely do not believe that plaintiffs in error are making such a request. If this court refused to review the verdict of a jury awarding one dollar for the taking of valuable railroad lands, would it be proper for it now to step in and say, because the assessment fixed by the verdict of the jury is slightly greater than the award, also fixed by the verdict of the jury, that therefore property has been confiscated? The case of *Norwood* v. *Baker* is not authority in support of a review by this court of these proceedings, because that whole decision was based upon the ground, as distinctly stated by this court in its concluding paragraph, that there was no opportunity given to the property owner to introduce evidence upon the question of benefits. The court did, however, hold in that case, that a special assessment levied according to the verdict of a jury upon the evidence, was a proper assessment, and an assessment which this court would not review. Such an assessment, we submit, is exactly the assessment in this proceeding.

Upon this proposition of deprivation of property without due process of law, opposing counsel also cites the case of *City of Bloomington* v. *Latham*, 142 Ill. 462. Here there was a condemnation of a man's land for an alley. The jury found the amount of

award for the land taken and damages to the remainder. Then Section 53 of Article IX of the Cities and Villages Act of 1872, usually used as a supplemental proceeding in special assessments (not special taxation in which assessments are levied according to a front foot basis irrespective of benefits) was attempted to be used to tax the remainder of the land (namely, that part which it was found was damaged), according to the frontage basis, and regardless of benefits. Such a proceeding was held by the Illinois Supreme Court to be a taking of property without due process of law, because the lands which were found to be damaged could certainly not be assessed for benefits. That case, however, is entirely different from the case at bar, in which, in one branch of this litigation, in the case of *City of Chicago* v. *Mccartney*, 216 Ill. 377, it was specifically found in the condemnation proceeding that there were no damages to the property assessed in this proceeding. The court held further, at page 474, in the City of Bloomington case, *supra*, that:

> "In other words, where the proceeding instituted under Section 53 is by special assessment, the property owner is compensated for the taking of his property either in special benefits alone, or in special benefits and money. If, therefore, Section 50 is so construed as to authorize a proceeding by special assessment, we are not prepared to say that it does not make such provision for compensation as will satisfy the requirements of the constitution. But we do not think that Section 53 should be so interpreted as to justify a resort to assessment by special taxation. Where the condemnation judgment is both for the value of the land taken, and for damages to the land not taken, an assessment by special taxation of the amount of the

judgment upon the land not taken compels the property owner to pay for his own land. In such case, the special tax, imposed as it is upon the abutting residue in proportion to its frontage, falls upon property which has been judicially determined to be damaged, and which, therefore, cannot be said to have been benefited. Hence, the provision for compensation is not adequate."

The court further holds at page 475 in this case:

"Where a part of a man's lot is taken for an alley, and the balance of the lot is damaged by opening the alley, special taxation of the part of the alley not taken, in proportion to its frontage as it abuts upon the alley, affords no just compensation for the loss. We are, therefore, of the opinion that Section 53 does not authorize assessment by special taxation. The section is correctly entitled in the revised statutes of 1874 (of Illinois) as follows: 'Supplemental petition to assess benefits in condemnation cases; Hurd's Revised Statutes of 1874, Chapter 24, Section 167; Section 53 of Article IX, page 240."

In other words, where damages have been awarded to property not taken in condemnation cases, it can clearly be said, as a matter of law, that there are no benefits to that part of the land which has been judicially determined to be damaged, and that consequently an assessment upon such land is manifestly improper. Such, however, is not the fact in the case at bar. Fortunately, there is an Illinois case which should be considered in connection with the City of Bloomington Case, because it not only states the principles applicable to the facts in the case at bar, but it is an actual decision in one phase of this particular litigation, and specifically refers to the very property assessed in this proceeding and now

before this court. This is the case of *City of Chicago* v. *Mecartney*, 216 Ill. 377, already referred to, in which the court says, at page 381:

> "If the jury in a condemnation proceeding award damages for property not taken, the judgment is conclusive against a subsequent proceeding to assess it for benefits, because the judgment is conclusive that there are damages and not benefits, but where a jury simply finds that there are no damages the verdict and judgment are not and cannot be conclusive that there are no benefits. The fact that property is greatly benefited and doubled in value by an improvement is not inconsistent with the verdict that it is not damaged, but perfectly consistent with it. It would seem to be an absurdity to say that the finding of a jury that the property of defendant in error was not damaged was also a findings that it was not benefited, a question which the jury could not legally consider."

As this case refers to the specific property before this court, we believe that it is a conclusive answer to plaintiffs' citation of the City of Bloomington case.

(*b*) *This Court will Follow the Interpretation Placed upon a State Statute by the Supreme Court of that State.*

It is the peculiar province and privilege of the state courts to construe their own statutes, and it is no part of the functions of the Supreme Court to review their decisions, except when specially authorized by statute.

*Adams* v. *Preston*, 22 How. 423.

*Congdon Mining Co.* v. *Goodman*, 2 Black. 574.

*Scott* v. *Jones*, 5 How. 243.

*Smith* v. *Adsit*, 16 Wall. 185.

*Klinger* v. *Missouri*, 13 Wall. 257.
*Nichols* v. *Levy*, 5 Wall. 433.
*Murray* v. *Gibson*, 15 How. 421.

This principle is concisely stated in the case of *Citizens Bank* v. *Louisiana Board of Liquidation*, 98 U. S. 140:

> "In fact, being the construction of a state statute by a state court, it controls us."

Upon this question as to whether the case at bar contains a situation sufficient to justify the application of the principle that this court will interfere in a case of the taking of property without due process of law, we wish to present for the consideration of this court the case of *Davidson* v. *Board of Administrators of New Orleans*, 96 U. S. 97, in which the court has clearly summarized the kind of cases in which the United States Supreme Court will take jurisdiction on the ground that private property is being taken without due process of law:

> "In fact, it would seem, from the character of the many big cases before us, and the arguments made in them, that the clause under consideration (Fourteenth Amendment, 'No state shall deprive any person of life, liberty or property without due process of law'), is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation upon which such a decision may be founded.
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> * * * * *
>
> That whenever by the laws of a state, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community,

and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It may violate some provisions of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the states in that regard. * * * the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution. * * *

It is said that part of the property of the plaintiff assessed is not benefited by the improvement, but this is a matter of detail with which this court cannot interfere."

This Davidson case is authority for the proposition that whether part of a person's property was or was not benefited by the improvement is not open to inquiry in the Supreme Court of the United States on a writ of error to a state court to review the validity of a drainage assessment claimed to deny due process of law.

## III.

NO FEDERAL QUESTION IS PRESENTED FOR REVIEW ON THE GROUND THAT THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION HAS BEEN VIOLATED.

We have already referred to the case of *Seattle* v. *Kelleher*, 195 U. S. 351, in our brief on the motion to dismiss for want of jurisdiction. That case lays down the rule that the doctrine respecting *bona fide* purchasers for value cannot be invoked to prevent the enforcement of the lien of a re-assessment for a local improvement by one who purchased the property affected, after the original attempt to assess had been declared void and before the new assessment was authorized.

In that case this court stated that:

> "A re-assessment may be a new assessment. What the legislature could authorize, if it were ordering an assessment for the first time, it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free 'to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property' in any constitutional way. (*Norwood* v. *Baker*, 172 U. S. 269, 293.) * * * We think it unnecessary to consider other questions on the part of the case that we have dealt with. We have said enough in our opinion to show that the enforcement of the assessment lien could not be prevented by the original one. It is urged, however, that a different rule could be applied in favor of one who purchased the land under the circumstances stated above. But the attempt to liken taxation, whether general or

special, to the enforcement of a vendor's lien, and thus to introduce the doctrine concerning *bona fide* purchasers for value, rests on a fallacy similar to that which would deny the right to tax upon an executed consideration. A man cannot get rid of his liability to a tax by buying without notice. (Cooley, Taxation, 3d Ed. 527, 528.) Indeed, he cannot buy without notice, since the liability is one of the notorious incidents of social life. In this case, the road was cut through the plaintiff's land, and if he had looked, was visible upon the ground. Whether it had been paid for was for him to inquire. The history of what had happened would have suggested that it was not improbable that sooner or later a payment must be made."

In our opening statement on the theory of this case at pages 9 and 10, we have endeavored to show by reference to the printed record in this case that there is no *bona fide* purchaser for value without notice in this case in the sense in which that term is usually employed. We there endeavored to show that one Harry S. Mecartney, the original owner of the property, at the time the previous attempts to assess were made, is now the real party in interest. By reason of having given bonds to his vendees indemnifying them from any assessment in this proceeding, he would be the party who would be liable to pay the assessment. Assuming, however, in accordance with the suggestion of opposing counsel on page six (6) of his brief on the merits, that the original owner, Harry S. Mecartney, may no longer be solvent, and that his vendees would really have to pay the assessment, even then we can see no proper application of the principle of "*bona fide* purchaser for value without notice." These vendees could

have known from the physical situation of the property that this street had been widened, and that eventually there would be an assessment to pay for that widening. In the second place, the examination of the title previous to the purchase of the property would certainly have disclosed the fact, if there were otherwise any doubt, that the previous attempts to assess had failed, and that, therefore, there was still a liability against the property to eventually pay its share of the assessment. In the third place, the very fact that bonds were required of the vendor by which he agreed to guarantee against a future assessment is a conclusive proof that these purchasers bought the property with their eyes open and fully aware of the fact that they might eventually have to pay an assessment. Upon this whole question, however, we believe that the Kelleher case, *supra*, to which we referred in our brief on the motion to dismiss, and to which opposing counsel made no reply, is a conclusive answer to this particular proposition.

While we feel that the above case answers the contention of counsel that there has been an impairment of the obligation of contract under the contract clause of the federal constitution, we believe that we should reply briefly to the two cases cited by opposing counsel upon this proposition, namely, the case of *Muhlker* v. *Railroad*, 197 U. S. 544, and *Great South. Hotel Company* v. *Jones*, 193 U. S. 532, lest our silence be construed as an admission that these cases have some application.

As we understand opposing counsel's proposition, he contends that there was a settled construction by the Supreme Court of Illinois of Section 46 of Ar-

ticle IX of the Cities and Villages Act of 1872 of Illinois, and that plaintiffs in error purchased their property upon the faith of such settled construction, and that after such purchase the Supreme Court of Illinois in this case reversed said previous rulings, and therefore, impaired the obligation of the contract entered into by plaintiffs in error. Without waiving the answers to these contentions already discussed, namely, that there has been no reversal of rulings by the state court (referred to in our argument on the merits), and that these plaintiffs in error are not *bona fide* purchasers for value without notice within the strict legal meaning of that term, we wish to discuss the general proposition whether a mere reversal of prior decisions by a state court (assuming that there is such a reversal) can constitute an impairment of the obligation of contract.

In the case of *Great Southern Fire Proof Hotel Company* v. *Jones*, 193 U. S. 532, the court held that an independent judgment as to the constitutionality, under a state constitution, of a mechanic's lien law, may be exercised by a federal court, notwithstanding decisions of the state courts rendered before the commencement of the suit in the federal court, but not until after the rights of the parties had been fixed by their contracts, declaring such law to be repugnant to the state constitution.

In that case, the State of Ohio gave a lien on the property of an owner to a sub-contractor. The Supreme Court of Ohio declared this statute unconstitutional. That decision, however, did not come up to this court for review on a writ of error from the state court, as it does in the case at bar, but in the

Jones case there was an appeal from a federal court, the Circuit Court of Appeals, which had held this state statute constitutional, contrary to the decision of the state court. This decision of the Circuit Court of Appeals holding this statute constitutional was affirmed by the United States Supreme Court in the Jones case. In this opinion this court held:

> "If, prior to the making of the contracts between the plaintiffs and McLain, the state court had adjudged that the statute in question was in violation of the state constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the state court, as to the constitutionality of the statute in question, having been rendered after the rights of the parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the constitution or laws of the state."

A study of the last part of the above quotation from this case will show that this case is not applicable to the facts at bar, inasmuch as it is not reviewing the decision of a state court, but the decision of a federal court. The principle, however, which is stated therein is favorable to our contention, namely, that the federal courts are inclined to adopt as the construction of a state statute the construction which

has been placed thereon by the state courts. In the Jones case this court did not adopt that construction, because such construction had not been placed upon the statute in question previous to the execution of the contract referred to in that case. We have examined this case with considerable care and find no intimation on the part of this court that a state court is forbidden from changing its rulings on the construction of a statute.

The other case referred to by counsel, namely, *Muhlker* v. *Railroad*, 197 U. S. 544, is, as in the case at bar, an appeal from a decision of a state court, and therefore, in that particular at least can properly be compared to the case at bar. In that case an owner of real property abutting on a street in New York City at the time he bought his property had a contract right to easements of light, air, and access which could not be taken away from him without compensation by the construction of an elevated railroad in the adjoining street.

Subsequent to the purchase of such property, the railroad company was authorized by the New York laws of 1892 to erect an elevated railroad in front of such property, and without any provision contained therein for compensation for interfering with the easements of light, air, and access of abutting property. It was therefore contended that that act of the legislature resulted in the impairment of the obligation of contract, which contention was sustained by this court. This merely illustrates the principle which we are contending for in this section of our argument, that this court under the contract clause of the federal constitution will not protect an in-

dividual against impairments of the obligation of contract made by the decision of state courts, but only against the impairment of the obligations of contract made by state statutes, and that the prohibition against the impairment of the obligation of contracts is aimed at a violation and interference of such contracts by state statutes. In support of our contention that that is the real meaning of the decision of this court in the Muhlker case, we respectfully refer this court to the latest citation of said Muhlker case in the recent case of *Ross* v. *Oregon*, 227 U. S. 150, in which case this court held as follows, at page 163:

> "The plaintiff in error cites the case of *Kring* v. *Missouri*, 107 U. S. 221; *Muhlker* v. *New York & H. R. Co.*, 197 U. S. 544; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Butz* v. *Muscatine*, 8 Wall. 575, as holding that a judicial decision may be a law in the sense of the constitutional provision which he invokes. But none of these cases, when rightfully considered, sustains that position. The first was a criminal case in which a provision in a new constitution was held to an *ex post facto* law as to an offense theretofore committed; *the second presented the question whether a state statute of* 1892 *impaired contractual obligations created by deeds of a much earlier date;* the third and fourth were sustained in *Central Land Company* v. *Laidley*, 159 U. S. 103; *Bacon* v. *Texas*, 163 U. S. 207, and *Turner* v. *Wilkes County*, 173 U. S. 461, and were there shown not to be in conflict with other cases on the subject, and the fifth is in no wise distinguishable from the fourth." (Italics, ours.)

The court held in this case of *Ross* v. *Oregon*, that a decision of a state court construing a state statute

made after the statute came into existence "was not a law" within the meaning of the provision against the impairment of contractual obligations by the state laws. The facts are analogous to the facts in the case at bar, because there is no question that the statute construed by the Supreme Court of Illinois in this proceeding, namely, Section 46 of said Article IX was in existence previous to any contract obligation which might have been formed in this case.

It is a significant fact that in this case of *Ross* v. *Oregon* there is likewise cited the very case cited by us in our brief on the motion to dismiss, namely, *Central Land Company* v. *Laidley*, 159 U. S. 103, as the leading case upon this proposition contrary to the contention of opposing counsel. This is certainly an interesting circumstance which we respectfully urge for the consideration of this court, that these two important cases, the *Muhlker* v. *Railroad* case, cited by opposing counsel, and the Central Land Company case cited by counsel for the City of Chicago, should have been brought together, as it were, in this very recent decision of this court and clearly and ably distinguished. This construction of the Muhlker case coupled, as it is, with the construction of the Central Land Company case, would seem to us to be a final settlement by this court of any doubt that might have existed in the minds of some that it was possible to impair the obligation of a contract by a change of ruling on the part of a state court. That that was the real question in issue in this Oregon case may be more particularly ascertained from the statement of the court at the bottom of page 160 of that case:

> "It will be perceived that the real complaint which we are asked to consider is not that the Supreme Court of the state in any wise rested its judgment upon a statute passed after the time of the alleged offense, but only that it misconstrued a pre-existing statute to the disadvantage of the plaintiff in error. * * *"

There is a long line of decisions of this court to the effect that the construction given to a statute or constitution of a state by the highest court of such state is regarded as part of the statute or constitution, and is as binding as the text upon the Supreme Court of the United States.

*Aicardi* v. *Alabama*, 19 Wall. 635;

*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28;

*Morley* v. *Lake Shore & M. S. P. R. Co.*, 146 U. S. 162;

*Fairfield* v. *Gallatin County*, 100 U. S. 47.

We briefly referred to this proposition in discussing the "due process" clause of the federal constitution and we beg the indulgence of this court in again referring to it in connection with the contract clause of the federal constitution.

On this proposition we only desire to analyze briefly the leading case of *Central Land Company* v. *Laidley*, *supra*. The question before this court in that case was whether the Supreme Court of Appeals of West Virginia rightly construed the provision of a statute of that state of 1868, prescribing the form of acknowledgment by a married woman of a deed of real estate, "and whether the court below gave a construction of that provision less favorable to the validity of such a deed than had

been given to it by its own earlier decisions and by the highest court of Virginia before the creation of the State of West Virginia." It seems that the Central Land Company had acquired title to a strip of land for a consideration of eleven thousand dollars ($11,000) from a certain Sarah H. Pennybacker. At this time the said Sarah Pennybacker was married. Subsequently, to wit, 12 years later, after she had become a widow, she executed and acknowledged in due form of law a deed of the same land to one Laidley, who, it was alleged, procured such land fraudulently and with notice of its previous conveyance, and for a price of only five hundred dollars ($500). The court held that the previous conveyance of Mrs. Pennybacker did not comply with the necessary legal requirements as to form, and was, therefore void, and so decided in favor of the subsequent purchaser, Laidley. The Central Land Company excepted on the ground that by the settled constructions of the statute of deeds, the original conveyance by said Sarah Pennybacker was sufficient in law to vest a good title in said Central Land Company. Upon this proposition and the proposition whether it had jurisdiction of this case this court held at the bottom of page 109, as follows:

> "The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it neces-

> sarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. * * * 'It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.'"

In this same case this court distinguished between cases involving the writs of error to a court of the United States and writs of error to the highest court of a state. We therefore desire to make a short quotation from this point, at the bottom of page 111, in order to show that the Great Southern Hotel Company case, quoted by opposing counsel, inasmuch as it is a writ of error to a federal court, has no application to the case at bar:

> "The distinction as to the authority of this court between writs of error to a court of the United States, and writs of error to the highest court of a state, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the constitution of the State of Iowa premitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The

> Supreme Court of the state, by decisions made before the bonds in question were issued, had held that it did; but by decisions made after they had been issued, held that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the state court, was reversed on the merits, and reversed by this court for misconstruction of the constitution of Iowa. (*Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 175, 206.) But a writ of error to review one of those decisions of the Supreme Court of Iowa was dismissed for want of jurisdiction, because admitting the constitution of the state to be a law of the state, within the meaning of the provision of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, the only question was of its construction by the state court. (*Mississippi & M. R. Co.* v. *McClure*, 77 U. S. 10 Wall. 511, 515.)"

In the case of *Weber* v. *Rogan*, 188 U. S. 10, 14, this court referred to its decision in the Central Land Company case as follows:

> "We had occassion to hold in *Central Land Company* v. *Laidley*, 159 U. S. 103, that we have no jurisdiction of a writ of error to a state court upon the ground that the obligation of a contract has been impaired, when the validity of the statute under which the contract is made is admitted, and the only question is as to the construction of the statute by that court; and in the same case as well as in *Hanford* v. *Davies*, 163 U. S. 273, we held that the constitutional inhibition applies only to the legislative enactments of the state, and not to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired."

It is well settled that the proper interpretation of any statute passed by a state for a purpose specified, and the acts which will be justified under the statute, are questions which lie exclusively within the determination of the highest court of a state.

*Aicardi* v. *Alabama*, 19 Wall. 636;
*Congdon* v. *Goodman*, 2 Black. 574;
*Grand Gulf R. & Bkg. Co.* v. *Marshall*, 12 How. 166.

In other words, the only controversy in this case is what acts are justified under the statute here in question, namely, Section 46 of said Article IX. If this proceeding can be justified under said Section 46, it has statutory warrant; if it cannot be justified, it has no statutory warrant. The Supreme Court of the state has decided that it is justified, and we respectfully submit that that is conclusive.

The case of *Mobile Transportation Company* v. *City of Mobile*, 187 U. S. 488, is authority for the proposition that

*A change of view by the highest court of a state with respect to the limit of private ownership upon tide waters does not raise a case under the contract clause of the federal constitution which can be reviewed by the Supreme Court of the United States.*

To the same effect is *National Mutual Bldg. & Loan Assn.* v. *Brahan*, 193 U. S. 635, 647, in which this court held:

> "Where the federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning

> of this clause in the constitution, so as to give this court jurisdiction on a writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court. (*Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18.)"

There is no claim in this case that any statute was passed subsequent to 1901, the date of the purchase of the property in question, which said statute has been construed or effect given thereto in this proceeding.

Likewise the *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 Howard, 317, lays down the proposition that the function of the contract clause of the federal constitution is solely, "to check any attempts of the law making powers of the state to retroact upon past contracts and impair their obligations."

It is respectfully suggested that both on the question of jurisdiction and on the merits the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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# APPENDIX.

## I. From Pages 15-17 Record.

Objections of E. O. Wood as to Sub-lots 7 and 8 of said Snow & Co.'s Sub. in Block 2. Said objections consisted of ninety-eight printed objections, among them the following, raised by the issues on the trial:

"45. The property of the objectors is assessed more than it will be benefited and more than its proportionate share of the cost of the proposed improvement."

"56. The proceedings for the new assessment are illegal and void, the prior ordinance being void."

"59. The proceedings for the supplemental assessments are illegal and void."

"62. The new assessment proceedings against the delinquents are illegal and void."

"76. The ordinance is informal and invalid."

"77. The ordinance is uncertain, informal and insufficient, and therefore void."

"80. The assessment is not levied upon the several tracts, pieces and parcels of land in proportion to the benefits to be derived from the construction of said improvement."

## II. From Pages 17-22 Record.

Objections of Louise Specht for Sub-lot 3 and of Alexander Squair for Sub-lots 4 and 5, and of Harry

S. Mecartney for Sub-lots 1 to 8 inclusive, of said Snow & Co.'s Subdivision, filed by Enoch J. Price, their attorney, March 21, 1910. Said objectors say that they are the owners of or interested in the several lots and parcels of land described and set opposite their respective names, and object, and for grounds of objection state as follows:

1. The said special assessment proceedings are void upon their face and upon the face of the record herein, and the court has no jurisdiction of such a proceeding or the subject-matter thereof.

2. There is no authority in law for making said assessment or for making any further assessment than the one made heretofore and confirmed as appears by the record in this case.

3. The petition for said assessment does not show facts sufficient to warrant any assessment whatsoever.

4. The said proposed assessment is neither a "new assessment," nor a "supplemental assessment," nor a "deficiency assessment," but on its face appears to be an attempt to levy an original assessment in this case; when it appears by the records herein that the original assessment has been levied and confirmed and all proceedings thereof have become consummate many years ago.

5. The orders entered in this case heretofore on motion of petitioner, and especially the order of January 23, 1910, vacating the former assessment petition in this case, destroyed or removed any foundation whatsoever for any such proceeding if the same were otherwise warranted in law.

6. If any such assessment were otherwise warranted in law the same would be barred by the limitation laws of Illinois, as it is more than five years, and even more than ten years, since the final confirmation of the assessment made heretofore in this cause.

7. The said petition for assessment was filed more than fifteen years after the said improvement was completed and consummated; and said proceeding is barred by reason of this fact alone.

8. The city council had no authority to pass the ordinance on which this proceeding purports to be based. Said ordinance is void for uncertainty, insufficiency and informality.

9. Said ordinance was not signed and was not in than fifteen years after the said improvement was filed.

10. The petition and assessment roll and the notices thereof do not comply with the provisions of the statute and are informal, insufficient and void.

11. Said assessment is levied upon a part only of the property specially benefited, by reason of which the property of objectors is assessed too high in any event and upon any basis.

12. It appears upon the face of the record that all benefits in respect to said improvement and as affecting the property in question have been adjudicated in the final condemnation judgment entered in this cause in the year 1894.

13. The City of Chicago in the hearing of the original petition herein for said condemnation judgment introduced evidence of all special benefits to

the property of said objectors, and all such benefits for which an assessment in any event could have been levied were involved in, adjudicated, allowed for and deducted in the rendering of the verdicts upon which said condemnation judgments were based.

14. Said assessment as a whole and as an entirety is unequal and unjust, and lacks the uniformity which the law requires.

15. The matter of benefits and all matters of such assessment were involved, adjudicated, determined and satisfied in the prior special assessment proceedings in this case.

16. The City of Chicago has lost any right which it might otherwise have to further assess the property of these objectors, by its failure to prosecute further the former special assessment proceedings herein.

17. The judgment entered in the former special assessment proceedings herein did not except therefrom any right to levy further assessments for the benefits from said improvement.

18. All benefits arising from said improvement of the property of these objectors have been fully paid and satisfied.

19. Said assessment is not levied upon the several parcels of land in the proportion of the benefits thereto from said improvement.

20. The property of these objectors is assessed more than its proportionate share of the actual cost of said improvement fairly and equitably chargeable on the same.

21. Said assessment upon the property of said objectors exceeds the benefits which have accrued to said property from the improvement.

22. The said assessment upon the property of said objectors exceeds the proportionate share of the expenses of said improvement equitably and fairly chargeable upon said property.

III. From Pages 24-26 Record.

Objections of Henry E. Sever as to Sub-lot 6, Snow & Co.'s Sub. in Block 2, Yerby's Sub. filed by Enoch J. Price April 26, 1910. Said objections consist of the ordinary long printed form of objections, some 113 in number, in which the following objections are pertinent to the issues made in the cause:

"2. The city council has no authority to pass the ordinance herein."

"12. The assessment is not levied upon the several parcels of land in proportion of the benefits flowing from said improvement."

"16. The assessment as made is unequal and unjust and lacks that uniformity which the law requires."

"17. The property of these objectors is assessed more than its proportionate share of the cost of the proposed improvement fairly and equitably chargeable upon the same."

"77. The assessment insofar as it affects the said property of objectors is unconstitutional and void."

"78. The assessment is wholly unconstitutional, inequitable and void."

"108. The supplemental assessment, the new assessment for completed work, and the new assessment against delinquents are each and every of them invalid and void."

"111. Said assessment is barred by the statutes of Illinois relating to limitations, and by the limitation laws of said state."

"112. Said petitioner has been guilty of laches and this is a bar to this proceeding."

"113. The property of objectors is not liable for said assessment. At the time said improvement was established the said Snow & Co.'s Subdivision was not existent."

IV.

Objections of Frank J. Willoughby as to Sub-lots 1 and 2 of Snow & Co.'s Sub., filed April 26, 1910, and being the same in substance and form as the objections of Henry E. Sever filed on said April 26th. The same are not abstracted, but reference is made herein to the preceding abstract of Sever's objections.

V. From Pages 409-414, Record.

June 14, 1910, motion in writing of objectors for new trial.

And now come the objectors and file herein their joint and several motions for a new trial, and as ground therefor show the court the following, to-wit:

1. The court is without jurisdiction of the subject-matter herein, and the court erred in submitting the issues or any of them to the jury.

2. There is no warrant in law for the said "new" assessment on the property of said objectors.

3. The petition and assessment roll were not based upon and made pursuant to a valid ordinance annulling the former proceeding herein.

4. The petition and assessment roll are barred by the statute of limitations of the State of Illinois, and by the provisions of the special assessment statutes applicable to this case.

5. The petition and assessment roll and all proceedings herein are barred by the laches of the petitioner.

6. The property described in the assessment roll, as it appears from the evidence herein, was not existent at the time of making the improvement, and the court erred in not instructing the jury to find the issues for the objectors on that ground.

7. The court erred in allowing over objection of objectors the jury to view the improvement made in 1893 and the premises objected for herein.

8. The court erred in holding that petitioner herein made its *prima facie* case by introducing in evidence before the jury the original ordinance for condemnation passed July 24, 1893, the two judgment orders of award for property taken and damaged entered respectively January 29, 1894, and October 26, 1894, and the new assessment roll filed herein on March 1, 1910; and the court erred in denying the objectors' motion for an instruction to the jury to find the issues for the objectors at the close of petitioner's case in chief.

9. The court erred in excluding evidence offered by objectors tending to show that on December 4,

1894, the petitioner filed its supplemental petition herein, praying that steps be taken to levy a special assessment to pay the cost of said improvement, and that thereafter on July 17, 1897, an assessment roll was returned into this court by commissioners appointed to levy the assessment and said roll filed in this court; that thereafter such proceedings were had in this court that an order of confirmation of the assessment as levied by said commissioners in said assessment roll as to all lots and parcels of land therein described, except as to the land included in the lots now owned by these objectors, was entered, and that said order of confirmation has never been annulled and set aside by a court of competent jurisdiction; that thereafter an order was entered sustaining objections as to said lots of these objectors and dismissing the supplemental petition for a special assessment as to said lots, and thereafter the petitioner sued out a writ of error to the Supreme Court of Illinois, seeking to reverse the said order sustaining objections to said assessment as to the lots now owned by these objectors, and such proceedings were had that the said Supreme Court reversed said order sustaining objections as to the lots now owned by these objectors, and remanded the cause for further proceedings, which opinion is reported in *City of Chicago* v. *Mecartney*, 216 Ill. 377; and that no remanding order was ever taken out of the said Supreme Court and filed in the office of the clerk of the Circuit Court in said cause, and that more than two years had elapsed since the entry of the judgment reversing and remanding said cause before the filing of the new petition and pretended assessment roll now before this court.

10. The court erred in excluding evidence offered by objectors tending to show that upon the trial of the issues as to compensation to property owners for land taken and damages to the remainder not taken in said original condemnation trial, the jury on that issue, under the instructions of the court and contentions of petitioner herein, did consider and assess the benefits accruing to the lands of the objectors by reason of the widening of said South Park avenue between 55th street and 56th street, and reduced the award for land taken by said amount.

11. The court erred in denying objectors' motion to exclude and expunge the evidence of petitioner's superintendent of special assessments.

12. The court erred in giving to the jury the sixth, eighth, ninth, thirteenth and fourteenth instructions given, wherein the jury were instructed that the question before them was as to future benefits to be enjoyed by said premises by reason of said improvement, instead of presenting the question as to supposed benefits enjoyed from said improvement when made in 1893.

13. The court erred in giving the eighth given instruction to the jury. The said eighth instruction and all the instructions taken as a whole gave undue and unwarranted prominence to the weight and effect of the commissioners' report and assessment roll in violation of law and prejudicial to the rights of these objectors before the jury.

14. The court erred in altering the objectors' second offered instruction, which as altered by the court was given as the eleventh instruction given to the

jury; the instruction should have been given as offered by objectors, viz.:

"The jury are instructed that the assessment roll offered in evidence by the city in this case would be *prima facie* evidence of the correctness of the assessment against objectors' property only in the absence of countervailing evidence on the part of objectors, but that it does not have the weight as proof, of the evidence of commissioners who signed it, nor of any witness."

15. The court erred in giving the thirteenth instruction given to the jury, wherein the court instructed the jury as a matter of law, in effect, that if the jury should believe from the evidence that the assessment as shown by the assessment roll was just and correct as to any lot of objectors, that then and in that case the jury might find for petitioner.

16. The court erred in giving the seventh given instruction, wherein the jury were instructed that they were not to consider the propriety of the improvement.

17. The court erred in giving the twenty-second given instruction. The said instruction, by reason of the charge to the jury that the amount of the cost of the improvement to be borne by petitioner could not be considered by the jury and could not be controlled by the court, was prejudicial to the rights of the objectors by giving an undue prominence to the assessment roll filed herein; and said instruction did not correctly state the law.

18. The court erred in giving the twenty-third given instruction.

19. Said verdict is contrary to the law and the evidence.

20. Said verdict is against the weight of the evidence.

21. The court erred in admitting evidence offered by petitioners over the objections of these objectors.

22. The court erred in excluding evidence offered by these objectors.

# WILLOUGHBY v. CITY OF CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 66. Motion to dismiss submitted November 6, 1914.—Decided November 16, 1914.

Where the constitutional question is obvious from the beginning and is not open in the Supreme Court of the State unless taken on the trial, it cannot be considered here unless it was so taken. *Hulbert* v. *Chicago*, 202 U. S. 275.

Where an assessment could have been levied for a past improvement against the original owners, purchasers take subject to the same liability, and such an assessment does not deprive them of their property without due process of law. *Seattle* v. *Kelleher*, 195 U. S. 351.

Whether a particular assessment could have been levied for past improvements if the property had not been sold depends upon the construction of state statutes, as to which this court follows the decisions of the state courts.

The overruling of its earlier decisions by the state court does not amount to deprivation of property without due process of law where no vested rights are interfered with. *Muhlker* v. *Harlem R. R. Co.*, 197 U. S. 544, distinguished.

On writ of error based on the claim that there was no power to make the assessment, this court cannot inquire into the facts as found by the state court in regard to value of the land taken for, and the extent of the benefit conferred by, the improvement for which the land has been assessed.

Writ of error to review 249 Illinois, 249, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, to review a judgment of the state court confirming a street widening assessment, are stated in the opinion.

*Mr. William H. Sexton*, *Mr. Philip J. McKenna* and *Mr. Howard F. Bishop* for defendant in error in support of the motion:

Special assessments are local matters. *Spencer* v. *Merchant*, 125 U. S. 345; Cooley, Taxation, 3d ed., p. 68.

This court does not interfere with revenue laws of the State. *French* v. *Barber Asphalt Co.*, 181 U. S. 324; *Witherspoon* v. *Duncan*, 4 Wall. 210, 217; *Williams* v. *Albany*, 122 U. S. 154, 164; *Shaefer* v. *Werling*, 188 U. S. 516, 517.

A special assessment is a species of taxation. *French* v. *Barber Asphalt Co.*, 181 U. S. 324, 343; *C. & A. R. R. Co.* v. *Joliet*, 153 Illinois, 649; *Adams County* v. *Quincy*, 130 Illinois, 566.

Special assessment proceedings are reviewed in this court only in exceptional cases. *Lombard* v. *West Chicago*, 181 U. S. 33; *Spencer* v. *Merchant*, 125 U. S. 345; Cooley, Taxation, 3d ed., p. 55; *Davidson* v. *New Orleans*, 96 U. S. 97; *Seattle* v. *Kelleher*, 195 U. S. 351, 359; Cooley, Taxation, 3d ed., p. 1280; *Williams* v. *Albany*, 122 U. S. 154.

The decision of the state court on question of fact is conclusive. *Spencer* v. *Merchant, supra; Building & Loan Ass'n* v. *Ebaugh*, 185 U. S. 114, 121; *Egan* v. *Hart*, 165 U. S. 188; *West. Un. Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92, 103; *Bement* v. *National Harrow Co.*, 186 U. S. 83.

This court accepts the conclusion of the state court as to the proper construction of a state statute. *Baltimore Traction Co.* v. *Baltimore Belt R. R. Co.*, 151 U. S. 137; *Green* v. *Neal*, 6 Pet. 291; *Davie* v. *Briggs*, 97 U. S. 628; *Louisville &c. Ry.* v. *Mississippi*, 133 U. S. 587, 590; *Chicago* v. *Mecartney*, 216 Illinois, 377; *In re Converse*, 137 U. S. 624, 631; *Turner* v. *Wilkes County*, 173 U. S. 461.

A change of view by the state court does not raise a Federal question under the contract clause of the Federal Constitution. *Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479; *Knox* v. *Exchange Bank*, 12 Wall. 379, 383; *St. Paul &c. Ry.* v. *Todd Co.*, 142 U. S. 282, 286; *New Orleans Water Co.* v. *Louisiana Sugar Refining Co.*, 125

U. S. 18, 30; *Railroad Co.* v. *Rock*, 4 Wall. 177, 181; *Bacon* v. *Texas*, 163 U. S. 207, 220; *Winona & St. Peter R. R.* v. *Plainview*, 143 U. S. 371, 393.

Plaintiffs in error have not been deprived of their property without due process of law. *Allen* v. *Georgia*, 166 U. S. 138; *McQuade* v. *Trenton*, 172 U. S. 636, 639; *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112.

No Federal question was decided by the Illinois Supreme Court, nor was any Federal question necessary to its decision. Therefore, the writ should be dismissed. *Marrow* v. *Brinkley*, 129 U. S. 178; *McQuade* v. *Trenton*, 172 U. S. 636; *Harrison* v. *Morton*, 171 U. S. 38; *Bacon* v. *Texas*, 163 U. S. 207; *Kreiger* v. *Shelby R. R. Co.*, 125 U. S. 39; *Desaussure* v. *Gaillard*, 127 U. S. 216; *Hale* v. *Akers*, 132 U. S. 554; *Hopkins* v. *McLure*, 133 U. S. 380, 386; *Eustis* v. *Bolles*, 150 U. S. 361; *Beauprè* v. *Noyes*, 138 U. S. 397, 401; *Rutland R. R.* v. *Central Vermont R. R.*, 159 U. S. 630; *Gillis* v. *Stinchfield*, 159 U. S. 658, 660; *Seneca Indians* v. *Christy*, 162 U. S. 283.

*Mr. Charles R. Holden* for plaintiffs in error in opposition to the motion:

Special assessments are statutory proceedings, and without a statutory warrant no special assessment can be levied, and this applies to new or supplemental assessments. *Chicago* v. *Race*, 256 Illinois, 209.

The special assessment in question, a supplemental one, is without any statutory warrant. Section 53, under which the proceeding was had, did not expressly provide for any supplemental assessment.

A new or supplemental assessment, even if originally warranted under said § 53, which is at least a doubtful question, was barred in five years after July 2, 1908, under the plainly worded statute—so plain as to scarcely bear construction.

If this be considered as a new or reassessment under § 46, the same could not be levied after the confirmation judgment of July 2, 1898. *McChesney* v. *Chicago*, 161 Illinois, 110; *People* v. *McWethy*, 165 Illinois, 222; *LeMoyne* v. *Chicago*, 175 Illinois, 356; *Rich* v. *Chicago*, 187 Illinois, 396; *City* v. *Nichols*, 192 Illinois, 489; *Doremus* v. *Chicago*, 212 Illinois, 513; *Holden* v. *Chicago*, 212 Illinois, 289; *Chicago* v. *Hulbert*, 205 Illinois, 346, 357; *Chicago* v. *Nodeck*, 202 Illinois, 257, 266; *Noonan* v. *Chicago*, 231 Illinois, 588; *Chicago* v. *Race*, 256 Illinois, 209.

These owners had purchased upon the faith of this long line of uniform and settled rulings of the Supreme Court of Illinois. And hence the judgment here, based upon a square reversal of these rulings is a taking without due process of law. *Muhlker* v. *Harlem R. R.*, 197 U. S. 544; *Great South. Hotel Co.* v. *Jones*, 193 U. S. 532.

The judgment upon its face is pure confiscation of property. The property of plaintiffs in error is taken upon the ground that it is a public necessity, and then they are assessed over $300 more than the awards for the property taken from them.

This is in its essence a taking without due process. *City of Bloomington* v. *Latham*, 142 Illinois, 462; *Norwood* v. *Baker*, 172 U. S. 269.

Mr. Justice Holmes delivered the opinion of the court.

In 1893 a portion of certain land now belonging to the plaintiffs in error was taken by Chicago for the widening of a street, and the damages to the owners were fixed by judgment in due form. Afterwards an assessment for betterments by reason of the change was laid upon certain lands in this neighborhood including the lots in question and was confirmed as to the other land. At the trial with regard to these lots it was contended by the owner and ruled in the lower court that the matter was concluded

by the first judgment. This ruling was reversed by the Supreme Court of the State, *Chicago* v. *Mecartney*, 216 Illinois, 377, but by the failure of the City to file the remanding order within two years the assessment upon these lots failed. In January, 1910, the City passed an ordinance for a new assessment, the object of which was to reach these lots, and a new petition was filed. The Supreme Court of the State held that the validity of the assessment did not depend on the validity of the ordinance; that the petition was warranted by the former proceedings, and that a judgment for the amount should be affirmed. 249 Illinois, 249.

The error assigned is that the property of the plaintiffs in error is taken without due process of law and that the obligation of their contracts is impaired (they having purchased before this supplementary proceeding was begun), contrary to the Fourteenth Amendment and Art. I, § 10 of the Constitution of the United States. There is a motion to dismiss upon which we must dispose of the case. The objection which is urged is that there was no statutory authority for this proceeding and that the assessment was imposed by mere judicial fiat that could not have been anticipated and that was without warrant of law. If there were anything in this objection it was obvious from the beginning and as it was not taken at the trial it was not open in the Supreme Court of the State and could not be considered here. *Hulbert* v. *Chicago*, 202 U. S. 275. It is obvious too that the State could have authorized the proceeding followed here, which ordinarily is the only question to be considered by this court. *Missouri* v. *Dockery*, 191 U. S. 165.

If the assessment could have been levied against the original owners of the land, purchasers took subject to the same liability. *Seattle* v. *Kelleher*, 195 U. S. 351. The question whether it could have been levied if the land had not been sold depended upon the construction of state

statutes, as to which, we follow the decision of the state court. Even if the court had overruled earlier decisions it would have interfered with no vested rights of the plaintiffs in error. *Knox* v. *Exchange Bank*, 12 Wall. 379, 383. *Sauer* v. *New York*, 206 U. S. 536. *Moore-Mansfield Construction Co.* v. *Electrical Installation Co.*, 234 U. S. 619, 626. But it does not appear to have done so, and although its decision may have been unexpected, there was plausible ground for it in the statutes. We go no further, because there is no question before us of the kind that was before the court in *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, and *Tampa Water Works Co.* v. *Tampa*, 199 U. S. 241, 243, and in circumstances like these it is not within our province to inquire whether the construction was right. It is objected that less was allowed for the land taken than was charged for the benefit, but it is quite possible that the benefit was greater than the loss, and we cannot inquire into the fact.

*Writ of error dismissed.*